United States Court of Appeals

for the Second Circuit

APPENDIX

76-5025

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of The New York, New Haven And Hartford Railroad Company, Debtor

On Appeal From The United States District Court For The District Of Connecticut Honorable Robert P. Anderson, Circuit Judge Sitting By Designation

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
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In The

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor	No. 30226

STATEMENT OF POSITION OF TRUSTEE OF THE DEBTOR CONCERNING PETITIONS FOR ALLOWANCES UNDER §77(c)(12)

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May 6, 1976

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In The

UNITED STATES DISTRICT COURT
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In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor	No. 30226

STATEMENT OF POSITION OF TRUSTEE OF THE DEBTOR
CONCERNING PETITIONS FOR ALLOWANCES UNDER §77(c)(12)

INTRODUCTION

Parties Involved

This Statement of Position is submitted by the Trustee of the property of the Debtor. It relates to the petitions, under §77(c)(12) of the Bankruptcy Act, 11 U.S.C. §205(c)(12), for compensation and/or reimbursement of expenses out of the assets

of the Debtor's Estate submitted by Chase Manhattan Bank, N.A. ("Chase Manhattan"), trustee under the Debtor's General Income Mortgage; Manufacturers Hanover Trust Company, as corporate trustee and A. Frederick Keuthen, successor individual trustee (together hereinafter referred to as "Manufacturers") under the Debtor's First and Refunding Mortgage; United States Trust Company of New York ("UST"), trustee under the debtor's Harlem River Division Mortgage; and the New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (the "Bondholders Committee").*/

General Position of Trustee

The Trustee considers that it is neither necessary nor appropriate for him to respond in detail to the affidavits filed in support of the Petitions. The Court's intimate familiarity with Petitioners' activities permits it to weigh the evidence and reach conclusions concerning the pertinent issues without the need for the Trustee to furnish views on specific contentions. Moreover, the Trustee considers that it would be inappropriate for him to approach the hearing as an adversary of Petitioners who are also fiduciaries in this proceeding.

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*/ A list of the amounts sought by these Petitioners is contained in Appendix A.

It is the Trustee's position that the collective and individual activities of the Petitioners have materially benefited the Debtor's Estate and that they are entitled to awards under §77(c)(12). The issues before the Court, it is submitted, are the amount that should be awarded the Petitioners and how properly to take into account that the Estate has not received, and may never receive, the fruits of Petitioners' efforts in the inclusion proceeding.

JURISDICTION

As initially filed, the Petitions sought referral to the Interstate Commerce Commission (the "Commission") for the fixing of maximum limits, and they were so referred by Order No. 767 herein. They were withdrawn from the Commission without any action having been taken and are before the Court pursuant to its jurisdiction under §77(c)(12), as amended by §618(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 (Feb. 5, 1976) ("RRRRA"). See Orders Nos. 795A and 795C herein.

GENERAL DISCUSSION OF APPLICABLE STANDARDS

Statutes

Section 618(b) of the RRRRA withdrew from the Commission and transferred to the Court the Commission's powers and duties

under §77(c)(12). However, there is no indication in the legislative history that, in eliminating the Commission's role in this and certain other reorganizations, Congress meant to indicate dissatisfaction with its conduct in this area. Instead, it is fair to conclude that the legislation reflects Congress' view that the Commission's expertise and public interest role simply are no longer needed or applicable in the formulation of a plan of reorganization, or in asset conservation, where railroad operations are no longer involved. The Trustee concludes from this that the jurisdictional change reflected by §618(b) was not intended to effect a change in the legal principles applicable to petitions under §77(c)(12).

Persons covered by §77(c)(12) are divided by the statute into two categories:

(1) The first consists of reorganization managers, committees or other representatives of creditors or stockholders, or other parties in interest. Their allowances are limited to actual and reasonable expenses (including reasonable attorneys' fees) "incurred in connection with the proceedings and plan."

(2) The second includes trustees under indentures, depositaries, and certain other persons. They may receive allowances which cover both expenses (as defined above) and "reasonable compensation for services."

Sections 241-43 of Chapter X of the Bankruptcy Act, 11 U.S.C. §§641-43, govern the payment of allowances and other compensation to the reorganization trustee and his counsel, and to certain creditor interests and their attorneys in non-railroad reorganizations. Although these provisions are not directly in point, certain analogies may be drawn in appropriate circumstances. */

Similarly, criteria established by the American Bar Association provide guidance in ascertaining the reasonableness of legal fees. The ABA Code of Professional Responsibility, DR2-106, provides as follows:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

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*/ A number of §77 compensation decisions of the Commission and the courts have referred to the case law under Chapter X in support of particular points. See In re New York, N.H. & H.R.R., 46 F. Supp. 214 (D.Conn.), modified sub nom. Connecticut Ry. & Lighting Co. v. Palmer, 132 F.2d 670 (2d Cir. 1942); Boston & P.R.R. Reorganization (Compensation and Expenses), 342 I.C.C. 859, 868-71 (1974).

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Although these criteria identify significant factors to be considered in determining reasonable legal fees, they fail to indicate the emphasis to be given to each of the several factors or to establish boundaries within which the discretion of the trial judge must be exercised. See Comment, Computing Attorney's Fees in Class Actions: Recent Judicial Guidelines, 16 B.C. Ind. & Com. L. Rev. 630 (1975). Nonetheless the criteria have served as guidelines in a number of recent cases. E.g., Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309 (7th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); Donson Stores, Inc. v. American Bakeries Co., 60 F.R.D. 417 (S.D.N.Y. 1973); Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), modified on other grounds, 517 F.2d 1237 (D.C. Cir. 1974); Clark v. American Marine Corp., 320 F. Supp. 709 (E.D.La. 1970), aff'd, 437 F.2d 959 (5th Cir. 1971).

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Decisional Law

The following principles have been applied by the Commission and the courts under §77(c)(12) and related provisions of Chapter X.

1. Allowances for expenses or compensation are ordinarily made only in connection with a plan of reorganization, and those seeking allowances must be "'directly involved in the preparation, negotiation and putting through of a plan of reorganization.'" Savannah & A. Ry. Reorganization, 228 I.C.C. 543, 558 (1938), quoting In re United Cigar Stores Co., 21 F. Supp. 869, 875 (S.D.N.Y. 1937); accord, Boston & P.R.R. Reorganization (Compensation and Expenses), 342 I.C.C. 859, 867 (1974). However, until very recently substantially all reported §77(c)(12) cases appear to have involved petitions filed and decided in the context of an approved, but not necessarily confirmed, plan of reorganization. Last year the Commission indicated that interim allowances under §77(c)(12) may be made in advance of any plan proceedings. Penn Central Transp. Co. Reorganization (Compensation), 348 I.C.C. 59 (1975). This reflected a concern that, in light of the anticipated duration of the proceeding, it would unfairly burden §77(c)(12) claimants to require them to await its conclusion before payment.

2. Allowances are payable only for active (even if unsuccessful) work closely connected to the reorganization. Thus, mere attendance at hearings, giving advice, legislative matters, etc., do not by

themselves serve as a basis for allowances. In re Hudson & M.R.R., 224 F. Supp. 815, 839 (S.D.N.Y. 1963), modified, 339 F.2d 114 (2d Cir. 1964) (Chapter X proceeding); New York, N.H. & H.R.R. Reorganization, 290 I.C.C. 41, 45 (1960); Boston & P.R.R. Reorganization (Compensation and Expenses), supra at 869-70.

3. In seeking an allowance under §77(c)(12), the petitioner has an affirmative burden to prove that his services measurably benefited the estate and promoted the reorganization of the debtor. Missouri Pac. R.R. Reorganization, 212 I.C.C. 662, 665, aff'd, 217 I.C.C. 577 (1936). The services for which allowances are sought must generally have benefited all interests in the estate and not those of a special, limited group, Bass v. Quittner, Stutman & Treister, 381 F.2d 54, 59 (9th Cir. 1967) (Chapter X proceeding), and must have advanced the course of reorganization, and not impeded it, In re Boston & P.R.R., 260 F. Supp. 415, 422 (D.Mass. 1966), cert. denied, 389 U.S. 974 (1967); Boston & P.R.R. Reorganization (Compensation and Expenses), supra at 867-68. As indicated above, the Trustee considers that Petitioners' affidavits carry the burden of showing a material, quantifiable benefit to the Estate.

4. It must be shown by the petitioner that the services for which an allowance is sought are not cumulative, overlapping, or duplicative of those of other claimants or, in particular, the services rendered by the reorganization trustee and his counsel or by a duly constituted bondholders' committee and its counsel Boston Terminal Co. Reorganization, 290 I.C.C. 149, 154 (1953).

5. With respect to the level of compensation to be awarded, consideration must be given to the time spent, the nature and complexity of the work performed, the need for the services, the importance of the work relative to other needs of the estate, benefit to the estate, the availability of funds in the estate, and the individuals who actually performed the services. Penn Central Transp. Co. Reorganization (Compensation), supra; New York, N.H. & H.R.R. Reorganization, 342 I.C.C. 632 (1974).

Additionally, several recent decisions under antitrust and other statutes providing for judicial awards of attorneys' fees in class actions illuminate the standards courts have applied generally in determining reasonable attorneys' fees. While the circumstances and purposes of the awards in these cases differ in various ways from those affecting proceedings under §77(c)(12), they provide guidelines useful in assessing the reasonableness of fee awards under §77(c)(12).

The general conclusion that may be reached from a review of recent cases is that the amount of the attorneys' fee finally awarded is the result of a balancing process in which the court weighs a variety of factors in light of the particular circumstances of each case. The most important factor, and frequently both the starting and ending point in computing the size of the award, is the number of hours logged and the applicable hourly rates. In addition, adjustments can be made for the amount recovered (analogous to benefit to the estate in §77(c)(12) proceedings) or other results obtained, the novelty and complexity of the

issues, the skill displayed by the attorneys, and other factors. Fee arrangements directly relating compensation to the amount of the recovery, however, have been regarded unfavorably by the courts, primarily on the ground that such contingent fee awards usually result in grants which are exorbitant in light of the benefit actually conferred and the services rendered. E.g., Kiser v. Miller, supra.

In City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), the Court of Appeals for the Second Circuit recently considered at length the problem of judicial determination of reasonable attorneys' fees.*/ The case involved the consolidation of three antitrust national class actions. A settlement agreement, executed after three years of pendency and pretrial preparation, provided for the establishment of a settlement fund of $10 million. The district court approved the settlement and awarded attorneys' fees of $1.5 million (against a request for $2.5 million) to plaintiffs' counsel. This award was challenged on appeal as completely out of proportion to any services performed by counsel and as a de facto reliance on a contingent fee approach alleged to be impermissible in cases of that nature. The lack of an evidentiary hearing on the issue was also a ground on appeal.

In holding that the fee was "excessive and displayed too much reliance upon the contingent fee syndrome,"**/ the court discussed

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*/ 495 F.2d at 468 et seq.

**/ Id. at 468.

at length the appropriate standards for determining reasonable attorneys' fees. Citing two recent antitrust cases,*/ the court set forth the following "generally accepted factors to be weighed in determining a reasonable attorneys' fee":

> (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,
> (2) the standing of counsel at the bar - both counsel receiving the award and opposing counsel,
> (3) time and labor spent,
> (4) magnitude and complexity of the litigation,
> (5) responsibility undertaken,
> (6) the amount recovered,
> (7) the knowledge the court has of conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,
> (8) what it would be reasonable for counsel to charge a victorious plaintiff.**/

It then expressed substantial dissatisfaction with this "conceptual amalgam" because of the difficulties of specific application, particularly in view of the district court's determination of a $1.5 million fee -- 15% of the settlement recovery -- despite having "ostensibly applied these cumbersome rules."***/

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*/ Transworld Airlines, Inc. v. Hughes, 312 F. Supp. 478 (S.D.N.Y. 1970), modified on appeal, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258 (M.D.Pa. 1965), vacated on other grounds, 377 F.2d 776 (3d Cir. 1967), aff'd in part and rev'd in part, 392 U.S. 481 (1968).

**/ 495 F.2d at 470.

***/ Ibid.

The court concluded that the starting point of every fee award must be a calculation of the attorney's services in terms of the time he has expended on the case. It was further observed that "[a]nchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."*/

The court stated that the next step was to value the time expended; the two primary considerations here would be the manner in which the time was spent (discovery, oral argument, negotiation, etc.) and by whom (senior partners, junior partners, or associates). While other factors, such as the risk of litigation, may be introduced into the calculus, the "simple mathematical exercise" of calculating attorneys' hours and hourly rates "is the only legitimate starting point for analysis."**/ In determining what weight should be given to the "risk of litigation" factor, the court suggested that the following questions be asked: "has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant; have related civil actions already been instituted by others; and are the issues novel and complex or straightforward and well-worn?"***/ The court concluded that consideration of these and other questions, in combination with the enormous amount of information necessary to determine time spent and appropriate billing rates, required an evidentiary hearing; the matter was accordingly remanded to the district court for further proceedings.****/

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*/ Ibid.
**/ Id. at 471.
***/ Ibid.
****/ Id. at 473-475.

While there is no fixed relationship between the size of the recovery and the corresponding fee award, it is a significant factor. In a recent stockholders' derivative case, it was observed that the "traditional' range of fee awards is from 20% to 30% of the recovery. Rosenfeld v. Black, 56 F.R.D. 604, 605 (S.D.N.Y. 1972). Arenson v. Board of Trade, 372 F. Supp. 1349, 1357 (N.D.Ill. 1974), sets out a table showing the relationship between attorneys' fee awards and recoveries in fourteen recent cases. They range from 5% to 67%; half are 20% or below. However, each of the awards arose in the context of a treble damage antitrust action in which the public policy considerations regarding attorneys' fees are different from those that obtain in this proceeding.

ANALYSIS OF PETITIONS UNDER CONSILERATION

General Analysis

Applying the foregoing general principles to the petitions under consideration, the threshold question is whether they may properly be considered at this time at all. Normally, petitions for awards under §77(c)(12) may only be considered in connection with a plan of reorganization. E.g., Savannah & A. Ry. Reorganization, supra. Petitioners' chief claim of benefit to the Debtor's Estate is based on their activities in the inclusion proceedings which culminated in the New Haven Inclusion Cases, 399 U.S. 392 (1970). That proceeding directly involved a plan of reorganization and Petitioners'

efforts resulted in an increased valuation for the Debtor's assets conveyed to Penn Central Transportation Company ("Penn Central"); but, in light of Penn Central's reorganization, it is impossible to predict at this time when and to what extent that benefit will be realized. It is thus arguable that the same problems obtain with regard to the uncertainty of benefit as would be the case if no plan of reorganization had ever been approved.

Nevertheless, the Trustee considers that it is appropriate to consider these Petitions and make awards out of the Debtor's Estate at this time. To the extent that the services for which compensation and expenses are claimed are "watchdog services" rendered by indenture trustees, the Trustee considers they should be compensated. As the Trustee has heretofore advised both the Court and the Commission, it is not necessary to show quantifiable benefits to justify an award for these types of services; the very presence in the reorganization proceedings of the indenture trustees, their review of matters coming before the Court and otherwise keeping informed of developments in the reorganization proceedings, and their fulfilling of their duties under the trust indenture, in and of themselves constitute benefits to the Estate. Since these benefits are already ascertainable and do not depend upon the outcome of the Penn Central reorganization, interim allowances can and should be made for them. As to those services, the only issue would appear to be the level of compensation; hourly rates for such services should be modest.

Moreover, with respect to all the Petitioners, the Trustee considers that the length of, and the unusual circumstances presented by, the Debtor's reorganization justify consideration

of the Petitions at this time. See Penn Central Transp. Co. Reorganization (Compensation), supra. It is fair to conclude that but for the intervening Penn Central reorganization, a plan of reorganization for the Debtor would have been consummated well before now; instead there remains an indefinite future period before the existing uncertainties can be resolved. The Trustee considers that, subject to the considerations hereinafter discussed, fairness and equity dictate that Petitioners not be required to await completion of the Debtor's reorganization before their Petitions can be entertained.

In considering whether Petitioners are entitled to awards under §77(c)(12) other than for watchdog services, the Trustee, as has been stated above, believes that the threshold criterion, the requirement that they have provided some material benefit to the Debtor's Estate, has been met by each of the Petitioners. The Trustee considers that the appropriate measure for an award for compensation and/or expenses should both reflect an appropriate hourly rate for the compensable time spent and be in balance with the benefit afforded the Estate by the subject services.

In determining an award, compensable time is limited to services that: 1) are closely connected to the reorganization;*/ 2) have measurably benefited the entire Estate and not just a part of it;**/ and 3) are not unnecessarily duplicative of the work of others.***/

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*/ E.g., In re Hudson & M.R.R., supra.

**/ Missouri Pac. R.R. Reorganization, supra; Bass v. Quittner, Stutman & Treister, supra.

***/ Boston Terminal Co. Reorganization, supra.

Considering each of the three criteria more specifically, allowances are payable only for active work closely connected to the reorganization. For example, an allowance should not be made for services rendered in connection with legislative lobbying or other activities which are only tangentially related to the reorganization, even though the proposed law may have benefited the Debtor's Estate. Services which are rendered outside these reorganization proceedings in connection with the prosecution of the Estate's claims against third parties, such as in the Penn Central reorganization proceedings, either before the Commission or the Penn Central reorganization court, would customarily also be non-compensable in this proceeding. This is particularly so if that work is unnecessarily duplicative of the Trustee's activities.

Secondly, the services for which an award is claimed must provide a measurable benefit to the entire estate and not to only one part of it.*/ In addressing this issue, it should be noted that the Petitions of the indenture trustees must be analyzed somewhat differently from that of the Bondholders Committee. Unlike the indenture trustees, the Bondholders Committee is a true volunteer and, as such, is not entitled to expenses for watchdog type services and must show actual, quantifiable benefit before it can

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*/ This analysis of the benefit rendered to the Debtor's Estate, i.e., the determination of which services are compensable, should be distinguished from the quantitative analysis of benefit necessary for the determination of how much should be awarded for those services. The quantitative analysis is considered later in this memorandum.

be entitled to an award. However, to the extent that the indenture trustees are claiming compensation and expenses on the basis of quantifiable benefits, as distinguished from watchdog type services, the treatment of those claims is similar to those of the Bondholders Committee.

Notwithstanding this requirement, however, it is both impractical and inconsistent with the nature of this proceeding to do a service by service analysis to determine whether each particular service resulted in a benefit to the Debtor's Estate. Thus, even though it is arguable that the Bondholders Committee is entitled to an award only for those services in the inclusion proceedings directly connected with the valuation increase, the Trustee considers that such a view would be unduly narrow. Having achieved the right to an award under §77(c)(12) through a material, quantifiable benefit, the Trustee considers that other services should be compensated, as being indirectly related to the benefit produced, unless those services are clearly non-compensable. Thus, the Bondholders Committee's activities in advance of the inclusion proceeding presumptively provided the background necessary to success in the inclusion proceeding.

Finally, awards may be made only for those services which are not unnecessarily duplicative of the services of others. In this regard, an analysis of the affidavits submitted by the Petitioners indicates a substantial amount of duplication, both in services and benefits claimed. The issues are what services are

unnecessarily duplicative of others, and how to fashion an award that takes into account that all Petitioners claim credit for substantially the same benefits.

Services that the Court considers were unnecessarily performed by any of the Petitioners, because they duplicated services of the Trustees, are not entitled to payment out of the Debtor's Estate. If the work under consideration did not duplicate services of the Trustees or another party having primary responsibility in the area, the issue is a different one: duplicative services have resulted in duplicate, if not conflicting, claims of benefit. The answer lies in avoidance of multiple awards for but a single benefit. It is submitted that this can best be achieved by first determining an appropriate aggregate award based upon the total benefit bestowed on the Estate, and then dividing that award among the Petitioners, based on the Court's view of the relative importance of the role played by each.

This is a different problem from the one addressed in City of Detroit v. Grinnell Corp., supra, and it requires a modified approach. There, primary emphasis was placed on the "simple mathematical exercise" of applying hourly rates to attorneys' hours. Whereas, in this case, a principal - if not, the principal - unknown is the number of attorneys' hours that should be compensated at customary hourly rates. Thus, as indicated above, the Trustee's approach is to determine an aggregate award that both is reasonable in terms of the benefit produced by Petitioners and also tests out in terms of an hourly rate based upon various assumptions as to the number of compensable hours.

A final point should be made concerning unnecessary duplication of services. Two of the Petitioners, Manufacturers and Chase Manhattan, resigned because of conflicts of interest making it necessary for the Court to appoint successor indenture trustees. It appears from the affidavits of the respective successors, Messrs. Iannotti and Zeldes, heretofore filed with the Court in support of their fee petitions, that they were required to spend substantial time in learning the background of this proceeding simply to become prepared to assume the role of indenture trustee. It would be appropriate, the Trustee considers, to take into account amounts awarded to Messrs. Iannotti and Zeldes in respect of their startup period when fixing compensation for Chase Manhattan and Manufacturers. To the extent that there has been an analogous duplication of effort on account of the Bondholders Committee's change in counsel from Messrs. Breed, Abbott & Morgan to Messrs. Migdal, Tenney, Glass & Pollack, similar considerations are warranted.

Conflict of Interest

An additional question is raised with respect to the petition of Manufacturers. Specifically, in addition to its role as indenture trustee under the Debtor's First and Refunding Mortgage of 1947, Manufacturers was indenture trustee under the 1897 Gold Bond Mortgage of the New York Central and Hudson River Railroad Company and other Penn Central

mortgages.*/ Throughout the litigation concerning the price to be paid for the Debtor's properties transferred to Penn Central on December 31, 1968, Manufacturers was indenture trustee for two groups of bondholders with conflicting interests. However, until Penn Central filed for reorganization in June, 1970, Manufacturers' duties under the Penn Central mortgages were limited to areas unaffected by the conflict. Once Penn Central went into reorganization, the latent conflict became manifest.

By petition dated June 21, 1971, Manufacturers requested authority from the Court to resign as corporate trustee and for A. Frederick Keuthen to resign as individual trustee. Petition of Manufacturers Hanover Trust Co. and A. Frederick Keutnen, 12 New York, N.H. & H.R.R. Reorganization Proceedings 8721 (June 21, 1971). The principal reason advanced (paragraph 4 of the Petition) was the existence of the conflicting positions facing Manufacturers as a result of its varied roles in the Penn Central reorganization and its responsibilities as indenture trustee under the First and Refunding Mortgage. The petition stated, "these conflicts have remained largely

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*/ Manufacturers is also a creditor of Penn Central. It is one of several bank participants in a $300 million loan to Penn Central under the April 1, 1969 Credit Agreement and one of the banks that loaned $50 million to Pennsylvania Company (a subsidiary of Penn Central) under the March 21, 1970 Credit Agreement. It is also the holder of certain equipment obligations of Penn Central subsidiaries. See Petition of Manufacturers Hanover Trust Co. and A. Frederick Keuthen, 12 New York, N.H. & H.R.R. Reorganization Proceedings 8721, 8722 (June 21, 1971).

latent, the situation will probably change as a result of the order of Judge Anderson referred to below."*/

In August, 1970, the Court, sua sponte, ordering a hearing on the remand entered by the Supreme Court in the New Haven Inclusion Cases, 399 U.S. 392 (1970), and invited statements of position from interested parties on issues specified in the Order. One such issue (paragraph 3C) was whether the Court should order an equitable lien or otherwise subject the assets conveyed to Penn Central to a security interest in favor of the Debtor's Estate. The Trustee's position was that the Court should declare the existence, since December 31, 1968, of an equitable lien and constructive trust. The Trustee was supported in this position by Manufacturers, represented by Messrs. Simpson, Thacher & Bartlett, who filed a supporting statement of position. However, at the same time, Manufacturers, as trustee under the Gold Bond Mortgage, filed an opposing statement through Messrs. Kelley, Drye, Warren, Clark, Carr & Ellis, which stated that Manufacturers "considers that this Court cannot, and ought not, order an equitable lien or in any way encumber the assets conveyed to" Penn Central.

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*/ The reference is to the Court's Order of June 22, 1971, concerning the equitable lien issue, In re New York, N.H. & H.R.R., 330 F. Supp. 131 (D. Conn. 1971), rev'd, 457 F.2d 683 (2d Cir.), cert. denied, 409 U.S. 890 (1972).

The Court's decision imposing the equitable lien and constructive trust issued on June 11, 1971. Ten days later, Manufacturers sought to resign as trustee under the First and Refunding Mortgage.*/ Subsequently, Manufacturers, together with the Penn Central Trustees, successfully appealed to the Court of Appeals for the Second Circuit, securing a reversal on jurisdictional grounds. The existence of an equitable lien and constructive trust is of utmost significance to every creditor of the Estate (with the possible exception of the highest priority administration claimants).

Research has been conducted to determine how matters of this nature have been treated in the past. We have not been able to locate a case where either the Commission or a reorganization court dealt directly with the conflict of interest question under §77(c)(12). In each instance where a conflict of interest issue seems to have been present, the Commission has disposed of the matter on other grounds. Thus, in Long Island R.R. Reorganization, 295 I.C.C. 208 (1955), Nassau County, New York sought an allowance of $80,936 for compensation and expenses out of the debtor's estate, primarily for the work performed by the County's counsel. The Commission allowed only $39,250, largely on the dual basis that much of the work involved was either of no benefit to the estate (as distinct

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*/ By Order No. 650, dated July 20, 1971, the Court granted Manufacturers' petition to resign and appointed Lawrence W. Iannotti as successor trustee.

from a benefit to the County) or was duplicative of the work of others. See 295 I.C.C. at 214. In doing so, however, the Commission commented on a conflict of interest point as follows:

> We are of the opinion that the circumstances do not justify imposing on the railroad the entire burden of meeting the cost of petitioner's representation in the proceeding. In certain respects positions taken by petitioner obviously were adverse to that which would have been most beneficial to the estate and to the creditors and stockholders as a whole. Also, a great portion of the services rendered, for example, those designed to correct alleged inequitable contracts with the Pennsylvania Railroad Company and the New York Connecting Railway Company, were duplicative of those rendered by the debtor's trustees, who were primarily responsible for the operation of the debtor's properties and protection of its estate. The maximum hereinafter fixed, therefore, will reflect our view as to the contributive value to the proceeding of counsel's services, without in any way reflecting upon the reasonableness to his client of the amount paid by the latter.*/

While the case law under §77(c)(12) regarding the effect of a conflict of interest in the situation under consideration is thus unclear, the courts have squarely dealt with the issue under Chapter X (and its predecessor, §77B), most notably in Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262 (1941). Woods involved an appeal from an order of a reorganization court disallowing a number of claims for compensation and expenses incurred in the course of the complex and protracted reorganization

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*/ Long Island R.R. Reorganization, 295 I.C.C. at 215 (Emphasis added).

of a real estate company. The claimants were an indenture trustee, a bondholders' committee, and the committee's counsel, the latter also serving as counsel to the indenture trustee. Without attempting to describe the various conflicts of interest among these parties inter se and with others,*/ the essential basis for the disallowance of these claims by the reorganization court was that the claimants were pursuing interests of their own that were either of no benefit to the estate or, more often, were adverse to it. In affirming the reorganization court's order, the Supreme Court set forth basic standards for determining compensation claims under these circumstances:

> Under Ch. X of the Chandler Act the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization from whatever source they may be payable. Reasonable compensation for services rendered may be allowed. The claimant, however, has the burden of proving their worth. Furthermore, "reasonable compensation for services rendered" necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act. American United Mutual Life Ins. Co. v. City of Avon Park, 311 U.S. 138. Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted. Cf. Jackson v. Smith, 254 U.S. 586, 589. The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules, is apposite here: 'What is struck

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*/ These are summarized in the Supreme Court's opinion, 312 U.S. at 263-67.

at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases.' Weil v. Neary, 278 U.S. 160, 173. Furthermore, the incidence of a particular conflict of interest can seldom be measured with any degree of certainty. The bankruptcy court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation.

. . . A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries 'at a level higher than that trodden by the crowd.' See Mr. Justice Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464; 164 N.E. 545.

* * *

Some discrimination, however, is necessary in applying the foregoing rule to claims for expenses. Reimbursement for "proper costs and expenses incurred in connection with the administration" of the estate may be allowed. The rule disallowing compensation because of conflicting interests may be equally effective to bar recovery of the expenditures made by a claimant subject to conflicting interests. Plainly expenditures are not "proper" within the meaning of the Act where the claimant cannot show that they were made in furtherance of a project exclusively devoted to the interests of those whom the claimant purported to represent.*/

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*/ 312 U.S. at 267-69 (footnotes omitted).

While the Woods case and a companion case involving defaulted municipal bonds */ stand for the proposition that a reorganization court may disallow all fees, expenses, or other compensation sought by parties having a conflict of interest, **/ more recent Chapter X cases have adopted a more lenient attitude. For example, in Chicago & West Towns Rys. v. Friedman, 230 F.2d 364 (7th Cir.), cert. denied, 351 U.S. 943 (1956), the law firm which represented a bondholders' committee of the debtor, an inter-urban railroad, also represented a potential buyer of the debtor. Acting in the latter capacity, apparently with the knowledge of the bondholders' committee, an associate of the firm drew up a plan for the purchase and sale of the debtor's assets for which the firm was to be paid by both sides; the sale never went through. Notwithstanding the obvious conflict of interest, the firm sought and was awarded $12,000 from the debtor's estate by the reorganization court. In reducing this sum to $7,000, the appellate court stated:

> When the conflict of interest arose in May, 1953, petitioners should have followed the example of Bell, Boyd, Marshall and Lloyd, and have withdrawn as counsel of the Friss Committee. Not

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*/ American United Mut. Life Ins. Co. v. City of Avon Park, 311 U.S. 138 (1940).

**/ Denial of such compensation seems to rest on a combination of two principles: (1) denial is a penalty for misconduct and acts to deter such actions by others; and (2) the services contributed nothing of benefit to the estate. The former principle was dominant in the Woods case; in more recent Chapter X cases, such as the ones cited in the text, the latter element appears to have been given more weight.

having done so, they should be penalized in any allowance for fees that may be made. Authority exists for the disallowance of all fees. Woods v. City National Bank & Trust Company of Chicago, 321 U.S. 262, 269, 61 S.Ct. 493, 85 L.Ed. 820. But in several reorganization cases a less harsh rule has been adopted. A penalty of less than full forfeiture was approved in Silbiger v. Prudence Bonds Corporation, 2 Cir., 180 F.2d 917, 921; Berner v. Equitable Office Bldg. Corp., 2 Cir., 175 F.2d 218, 221. We may decide the extent of the penalty. Fuller v. Memphis St. Ry. Co., 6 Cir., 110 F.2d 577, 578.

Petitioners had rendered services of value to the Estate up to May, 1953. We think some reasonable allowance for such services should be made. We hold that the allowance for petitioners' fees as made by the District Court should be reduced by $5,000, and that petitioners should pay the costs on this appeal including all expenses for printer's fees for the record and briefs which were incurred by objectors, the appellants herein.

The order of the District Court allowing fees to Friedman and Rosenfield will be modified by reducing the amount of such allowance to $7,000. The costs of printing the record and the appellants' brief and reply brief will be taxed against appellees, Friedman and Rosenfield.*/

The cases cited by the Friedman court as favoring a less drastic penalty than full forfeiture are distinguishable from the Woods case, as well as from the case in which they were cited.**/

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*/ 230 F.2d at 369.

**/ While it may appear from the quotation that Fuller v. Memphis Street Ry., 110 F.2d 577 (6th Cir. 1940), is cited as authority on the conflict of interest point, the case does not deal with that issue. It supports the power of the appellate court to fix the amount to be paid rather than remanding the case to the trial court and, thus, is inapposite to the issue now under consideration.

In Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2d Cir.), cert. denied, 340 U.S. 813 (1950), the reorganization court had allowed compensation to an attorney who represented holders of two classes of bonds whose interests were conflicting. The award of compensation was to be deducted from the amount to be distributed to the holders of the one series of bonds who received substantially the full amount of their claim.

Even though the attorney represented conflicting interests, Judge Learned Hand, speaking for the appellate court, distinguished the case of a corporate reorganization from the other situations in which an attorney represents two clients with opposing interests:

> [I]n a corporate reorganization proceeding it is reasonable not to impose an entire forfeiture of the allowance, when it comes in no part out of any group that can have been prejudiced by the attorney's divided allegiance.*/

Since the award was paid from the bond series which was fully compensated in the reorganization, the court considered that the attorney's allowance should only be reduced, not denied.

The opinion in the second case cited, Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir. 1949), was also written by Judge Hand. In that case, the attorney for shareholders of the debtor was found to have breached his duty to the shareholders as a class by giving an outsider an opportunity to purchase shares at

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*/ 180 F.2d at 921.

a price lower than that which concealed facts would justify. Judge Hand held that Congress, under §249 of the Bankruptcy Act, 11 U.S.C. §649, had limited the penalty of entire forfeiture of allowances for fees and expenses to cases in which the claimant purchased property of the beneficiary. However, because of the breach of trust, the court applied the penalty which attends any such breach in equity, to wit: a reduction in the allowance for fees in proportion to the gravity of the breach. Some of the factors considered by the court in determining the gravity of the breach are set forth in the Restatement of Trusts §243, comment c at 751 (1935). In essence the Berner case is like many trust cases, where the trustee is surcharged for any profit realized by the trustee or loss sustained by the trust because of a breach of trust.

Thus, while Woods seems to provide authority for the argument that Manufacturers' conduct in the equitable lien litigation warrants disallowance of all compensation, there are several more recent cases which are ample authority for a more flexible approach. Since the Court's awareness of this issue has been made apparent by reference to it from the Bench, the Trustee considers that it is not necessary for him further to address the factual situation. As for the conclusions to be drawn based upon an application of the law to the facts, these are determinations more appropriately made by the Court. There is, however, one additional factor that the Trustee wishes to point out.

The cases cited deal principally with issues of compensation.*/ Manufacturers' petition deals principally with reimbursement of expenses. The total amount being requested by Manufacturers is $2,122,669.82. Of that amount $1,818,253.15 is for legal fees and expenses and $304,416.67 is for compensation.**/ If the Court considers Manufacturers' activities, in light of its conflict of interest, to warrant either disallowance or reduction of its fee, it is the Trustee's position that the Court should take into account that no question has ever been raised concerning the conduct of its counsel, Simpson, Thacher & Bartlett. Even though, as required under §77(c)(12), the petitioner is Manufacturers, rather than its counsel, and even though counsel can theoretically look to the client for payment, as a practical matter, a reduction in the amount allowed as reimbursement for legal fees is likely to impact persons who, in the Trustee's view, have benefited the Estate and as to whom no misconduct has even been intimated.***/

Quantification of Benefit

Since analysis of the benefits to the Debtor's Estate of Petitioners' efforts in the inclusion proceedings is extremely important in determining both entitlement to and size of the

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*/ The final quoted paragraph at p. 25, supra, of the Woods case indicates the appropriateness of drawing a distinction between compensation and reimbursement of expenses.

**/ See Appendix A.

***/ According to paragraph 13 of Manufacturers' Petition, Simpson, Thacher & Bartlett agreed with Manufactuers to look to awards under §77(c)(12) for its compensation, subject to a proviso in the case of unforeseen events.

requested awards, the Trustee considers that he should advise the Court of his views in this area. This includes both quantification of the aggregate benefit of Petitioners' activities and consideration of the circumstances in which the benefits were produced.

The background begins with the Trustees' report to the Court early in 1962 that combination with a trunk line carrier appeared to be the only possible means of reorganizing the Debtor. Later that year the Trustees sought and received the Court's authority to take unique advantage of a provision in the Interstate Commerce Act to petition the Commission to approve the merger of the Pennsylvania and New York Central Railroads ("Penn" and "Central") on the condition that the Debtor be included on "equitable terms".

As a result of the substantial case put in by the Trustees before the Commission, Penn and Central sought negotiations on terms of inclusion. As the record in the inclusion case shows, complex negotiations were carried on over an extended period. At that time, the Trustees also instituted two studies that would have a significant impact on the value ultimately determined for the assets conveyed to Penn Central. These were a liquidation study, based on alternative 6 and 10-year liquidation periods, and a study to show that the Debtor's railroad could be a profitable segment of a trunk line, if its passenger service obligations could be terminated.

The negotiations finally reached the point where the Trustees had to decide whether to accept terms that would fix a valuation floor and were supportable and justifiable by the data then available to the Trustees, but were less than what the Trustees had sought. The alternative - rejection of those terms - threatened frustration of the Penn-Central merger and any possibility of reorganization for the Debtor. The Trustees decided to accept, subject to approval of the Court, the final offer of Penn and Central, but only pursuant to an express understanding that the Trustees' agreement would not be argued by Penn and Central to be binding on the beneficial owners of the Debtor's Estate, and subject further, of course, to findings of fairness and equity by the Commission with review thereof by the Courts.

Based on the foregoing, it is the position of the Trustee that consideration should be given, in measuring the benefits from Petitioners' activities, to the significance of the Trustees' role in the entire reorganization and valuation process. This is highly relevant, it is submitted, for purposes of quantification of benefit and in analyzing the uniqueness and difficulty of Petitioners' activities. It also bears upon the issue of unnecessary duplication of services. But while this analysis should properly play an integral role in the determination of the appropriate level of payment, it is not raised in opposition to Petitioners' basic contention that they provided a material benefit to the Debtor's Estate. The issue here is not whether Petitioners are entitled to payment out of the Debtor's Estate; the issue is the appropriate size of that payment.

The value of the Debtor's assets transferred to Penn Central as found by the Supreme Court in affirming this Court, is $169.6 million.*/ In comparison, the Trustees' evidence was that as a freight-only railroad the Debtor had a value of approximately $156 million, while the net liquidation value of the assets to be conveyed was some $153 million. If the benefits produced by Petitioners' efforts are the difference between the values asserted by the Trustees and the amount finally determined, the benefit is $14-17 million.

Since the Commission's Second Supplemental Report rejected certain of the items of value asserted by the Trustees, another calculation of relevance is the difference between the Commission's figure of $125.8 million and the $169.6 million ultimate value. That difference is $43.8 million and is the maximum produced on any theory deemed relevant by the Trustee.

If the specific items of increase over the Commission's value of $125.8 million are analyzed, various of them are attributable to the correction of errors in calculations made by the Commission in aggregating the values put into evidence by the Trustees, rather than being attributable to a direct increase in property valuation. One such error resulted from the Commission's double deduction of the same $14.6 million of real estate taxes. Another was a failure to discount to present worth the expenses of liquidation, which resulted in an understatement of $3.8 million.

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*/ Plus a loss-sharing provision in the amount of $5 million.

Additionally, an increase of $4.4 million in the value of the Bronx Yard properties resulted from adoption of part of an alternative valuation for such properties that had been made available by the Trustees.

These considerations would appear to reduce the maximum value of $43.8 million to $30 million or less, depending on how much of these items are deemed attributable to the Trustees' efforts rather than Petitioners'.

The Trustee believes that it would also be appropriate, in appraising benefit, for the Court to consider whether Petitioners' activities with regard to the form of consideration constitute a quantifiable benefit.

As the Court is aware, the Trustees had concluded that it would be in the interest of the Debtor's Estate for a material part of the consideration to be in the form of stock of the merged company. Expert testimony was that the stock would have a value in the range of $75 to $100 million at the time of inclusion, and the mid-point of that range was used as the value. At one point in 1969, the stock traded on the New York Stock Exchange within a point of $87.50.

In the litigation that followed the conveyance, certain of Petitioners argued the insufficiency in value of the stock consideration based on various market price data. That left the question, however, whether such an approach was the proper one or whether some other method of insuring receipt of full compensation could be devised. The underwriting technique was

developed by the Court as the answer to this issue. The Court, the Trustee believes, is in the best position to determine if and to what extent a quantifiable benefit can be attributed to Petitioners' efforts in this area.

Of course, the foregoing analysis does not take into account, and the figures do not reflect, that in light of the Penn Central bankruptcy and the Supreme Court's remand to the Commission on the issue of form of consideration, only a small part thereof has at this point been received by the Estate. The balance remains to be judicially determined as to form of payment and even then the payment is inextricably bound into proceedings in the Penn Central reorganization. On the other hand, the Trustee considers that it is both in the Estate's interest and within the reasonable expectations of the Petitioners for the Court now to determine final allowances under §77(c)(12), so long as the same can be accomplished in a manner consistent with the existing uncertainties concerning benefit and with the necessity to retain enough cash resources to cover the Estate's expenses, including participation in the Penn Central reorganization.

Consideration of Amount and Method of Payment of Awards

Manufacturers, Chase Manhattan, and UST are no longer active in these proceedings. Except for the uncertainties surrounding the Estate's claim in the Penn Central reorganization, it is possible now to determine all matters with regard to their services. In light of the high priority accorded claims of this nature and

the requirement that a plan of reorganization provide for cash payment unless the claimant is willing to accept an alternative form of consideration, the Trustee belives that it is desirable to determine the Estate's liability in this area, to the extent it is possible to do so.

The Trustee recommends that the Court now determine final allowances based on the assumption that the Estate's claim against Penn Central will be fully paid. Jurisdiction should be retained by the Court to make any adjustment that may be appropriate in case the assumption is unfulfilled.

In the case of the three indenture trustees, the final allowances will fix the absolute maximum amount of their claims against the Estate. The Bondholders Committee is in a different position because it continues as an active party. Since its services during the period of common activity is so interwoven with the services of the other Petitioners and since it is desirable, from the standpoint of the beneficiaries of these Petitioners, to fix the Estate's exposure in this area, it is suggested that the award made to the Bondholders Committee for the period through December 31, 1971, be deemed final in nature. Any amounts now allowed it for the subsequent period should be deemed interim.

It is the Trustee's position, as noted above, that an aggregate award should be fixed, based on the assumption of ultimate full payment by Penn Central. Even though each of the Petitioners contributed to the end result, it is clear from the petitions and supporting affidavits that, with certain variations, they are all

talking about and claiming the same benefits. Since the Estate should not be burdened by multiple payments for the same benefit, the indicated procedure is to fix an aggregate amount and then divide it appropriately among the Petitioners. In light of the obvious duplication and its extent, it would be inappropriate to develop the fee simply by taking the hours spent and multiplying by the hourly rate that would have been applicable were the issue of duplication not present. Moreover, it would be a monumental task to attempt to determine with precision the extent to which there was unnecessary duplication and overlapping of services.

Based upon the foregoing analysis of the benefits produced by Petitioners, which indicated a range of $14 million to a maximum of $43.8 million, the Trustee considers the mid-point of that range, or about $30 million to be a reasonable figure to use as the benefit that will be bestowed on the Estate, assuming successful resolution of the Penn Central proceeding. Such a benefit would, in the Trustee's view, warrant an aggregate award to Petitioners of some $2.5 million in respect to attorneys' fees. Out-of-pocket expenses reasonably incurred should appropriately be reimbursed and reasonable compensation may properly be allowed to the indenture trustees. */

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*/ The Trustee considers that he does not have adequate information on which to take a position at this time as to the specific amount, if any, of such compensation.

That figure for attorneys' fees may be tested by working backward to determine the effective hourly rate for attorneys' time. If there were no issue of duplication, $2.5 million in fees would produce an average hourly rate of $57. However, it is considered that the test should take the duplication and overlapping of services into account. If it is assumed, for example, that half the total hours should be compensated at the appropriate full hourly rate, while the other half should be compensated at 50% of that rate, the basic or full hourly rate would be $76. Of the total time 51% was spent by associates and 49% by partners. Therefore, if it is assumed that partners' hours are, on average, billed at 1.5 times associates' hours, the suggested aggregate fee of $2.5 million works out to approximate hourly rates of $92 for partners and $61 for associates.*/

Once the aggregate fee is fixed, it will then be necessary to determine the manner and schedule of payment. Since the final allowances will be based on an assumption that may prove to have been invalid, the Trustee recommends that the entire amount not be paid at this time. There should now be authorized for payment that portion of each Petitioner's award that the Court

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*/ This may be compared with the ceiling rate of $90 per hour for senior attorneys which it is understood has recently been adopted by United States Railway Association and Amtrak. It is also the maximum suggested to the Special Court, Regional Rail Reorganization Act, by the Penn Central Trustees and others in connection with its recent appointment of a Special Master.

considers to be the minimum to which it is entitled.*/ This partial payment, which the Trustee considers may appropriately be made in two installments, will avoid the possibility that the Estate might later be required to proceed against Petitioners, three of whom are no longer active in these proceedings, for return of a portion of the award. The Court should retain jurisdiction as to payment of the remainder based upon ultimate treatment of the Estate's claim in the Penn Central reorganization.

The Trustee considers that an initial aggregate payment to Petitioners of $800,000, followed by an aggregate payment a year later of $450,000, would appropriately protect the Estate in this regard. It is not possible now to estimate when the Court will be in a position to determine whether the remainder of the $2.5 million, or a portion of it, should be paid. Petitioners would be free, of course, to petition the Court at any time they considered the matter could be resolved. The Trustee believes that final payment need not necessarily await consummation of a plan of reorganization. The only remaining question is whether the benefit will, in fact, be received.

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*/ It must be stressed that the ultimate treatment of the Estate in any plan of reorganization for Penn Central, even assuming that one could be carried out in a relatively few years, will depend upon the valuation of, and payment for, Penn Central's rail assets which were required to be conveyed to Conrail on April 1, 1976. It would seem optimistic to anticipate that such question could be resolved earlier than 10 years from now, and it would not be unduly pessimistic to assume that as much as 15-20 years may elapse before these matters are finally resolved. The valuation of those assets heretofore made by United States Railway Association, the government agency charged with formulation of the Final System Plan and hence determination of the actual assets required to be conveyed to Conrail, at less than $500 million, even if paid with interest at the expiration of the so-called certificates of value, would not produce sufficient assets in the Penn Central estate to establish an equity for claims junior to fully secured debt of Penn Central.

In determining the portion of the award that is to be paid at this time, the Trustee considers that it would be appropriate to consider projected cash requirements for administration of the Estate, particularly the diligent prosecution of its claim against Penn Central.

Following payment of the settlement with the City of Boston approved by Order No. 794, the Estate's remaining cash and short-term investments, less accrued current liabilities, aggregate $18,949,000. These are presently invested at an average yield of 5.12% per year, which produces income of $970,200. The Trustee is advised that it would be appropriate to anticipate a modest rise in the interest rate to about 5.5%, but since his primary emphasis is on safety of capital, it would not be prudent to anticipate a greater increase. For purposes of the analysis which follows, an increase in interest to 5.5% will be assumed.

Turning to expenses, it must be anticipated that the level of activity and concomitant expenses will be close to that of 1974 when expenses exceeded $1 million. As previously indicated to the Court, the Trustee believes that it is crucial to the Estate that an all-out effort be made to develop and effect a consensual plan of reorganization for Penn Central. This will be costly in effort and time. In addition, increases in salaries of the staff in New Haven and other operating costs must be anticipated so long as the cost of living continues to increase.

If, for example, the funds in the Custodian Account were reduced to $17,449,000 by a $1.5 million aggregate payment to Petitioners, annual investment income of $959,700 can be anticipated. If the payment were $1 million, annual investment income would be $987,200; and if the payment were $2 million, investment income would fall to $932,200. The foregoing computations assume an interest rate of 5.5% and no capital reductions on account of additional settlements of administration claims. They also do not take into account the effect in future years of any use of capital to meet expenses not covered by investment income or increases in the Custodian Account from Connecticut rental receipts, which are estimated at $200,000 for the remainder of 1976, $400,000 in 1977, and $200,000 in 1978, when they will cease. The figures anticipate that no payments of interest or principal will be required on the Trustees' Certificates.

Obviously, if the foregoing estimates concerning investment income and expenses are borne out, only a very small payment would be possible at this time if it were assumed there should be absolutely no capital invasion for current operations. However, the Trustee considers that a relatively modest invasion of capital for such purpose is not inconsistent with the Estate's best interest. In the first place, it would take advantage, appropriately, of the arrangement achieved with the United States of America under which interest accrues on the Trustees' Certificates only to the extent that the Estate has

income available for fixed charges. Secondly, it is consistent with the Trustee's fiduciary responsibilities to all claimants against the Estate, including the Petitioners, that payments be made at this time under §77(c)(12), so long as they are consistent with the interests of the Estate to which Petitioners also bear a fiduciary responsibility.

CONCLUSION

In conclusion, the Trustee considers that it is both appropriate and consistent with the best interests of the Debtor's Estate for the Court to consider and act on the Petitions at this time and to enter an order making awards under §77(c)(12) and authorizing payments consistent with the views expressed above.

Respectfully submitted,

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May 6, 1976

APPENDIX A

AMOUNTS SOUGHT

Chase Manhattan Bank, N.A.

A. The Application seeks allowance of compensation for services and reimbursement of expenses for the period from July 7, 1961 to March 31, 1972. It states that Chase Manhattan has been paid for its services as Registrar for the Income Bonds.

B. Amounts sought:

1. Compensation to Chase Manhattan	$ 44,400.00	
Expenses of Chase Manhattan*/	84,648.83	$129,048.83
2. Legal fees of Dewey, Ballantine	$791,513.00	
Disbursements of Dewey, Ballantine	19,605.47	$811,118.47
Total		$940,167.30

Manufacturers Hanover Trust Company and A. Frederick Keuthen

A. Petitioners seek an allowance for compensation and expenses incurred from July 7, 1961 to August 30, 1971, in performance of extraordinary services resulting from the bankruptcy. Normal trustee services are not included in the petition; Petitioners state that they have been paid $43,937.24 for such services since July 7, 1961.

B. Amounts sought:

1. Compensation to Manufacturers	$304,416.67

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*/ This figure does not include payments on account made by Chase Manhattan to Dewey, Ballantine in the amount of $365,755. Petitioner requests that this partial payment be disregarded and state that, upon payment by the Estate, Dewey, Ballantine will refund such payment to Chase Manhattan.

	Expenses of Manufacturers */		103,018.34
			407,435.01
2.	Legal fees of Simpson, Thacher & Bartlett	$1,700,000.00	
	Disbursements of Simpson, Thacher & Bartlett	15,234.81	
			$1,715,234.81
	Total		$2,122,669.82

United States Trust Company of New York

A. Petitioner seeks allowances for compensation and expenses from July 7, 1961 to April 1, 1975.

B. Amounts sought:

1.	Compensation to UST	$ 75,000.00	
	Expenses of UST **/	275.36	
			$ 75,275.36
2.	Fees for services of HS Equities, Inc. (consultants to UST)		12,500.00
3.	Legal fees of Carter, Ledyard & Milburn	$ 700,000.00	
	Disbursements of Carter, Ledyard & Milburn	16,029.62	
			716,029.62 ***/
			$ 803,804.98

*/ This figure does not include $91,398.26 which Manufacturers advanced to Simpson, Thacher & Bartlett, as partial payment; Petitioners request that the partial payment be disregarded as they will look to Simpson, Thacher & Bartlett for repayment.

**/ This figure does not include $188,182.02 advanced to Carter, Ledyard & Milburn as partial payment, or $34,621.25 advanced in connection with preparation of the instant Petition. UST received $51,204.54 from bondholders in 1966 to defray a portion of its legal expenses. Both UST and Carter, Ledyard & Milburn will repay these advances upon receipt of the requested allowance.

***/ There is an error in addition in the Petition. It has been corrected for this Appendix.

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New York, N.H. & H.R.R. First Mortgage 4% Bondholders Committee

A. The Committee's Petition seeks an allowance for its expenses for legal counsel incurred from July 8, 1961 to December 31, 1973; the Petition requests leave to apply for the Committee's other expenses when application for final allowances is made. The Committee has submitted affidavits of Breed, Abbott & Morgan; Migdal, Tenney, Glass & Pollack; Cohen, Shapiro, Polisher, Shiekman & Cohen; and Harry P. Lander. Breed, Abbott seek payment for legal services rendered to the Committee from July 8, 1961 to February 3, 1967. Migdal, Tenney seek payment for such services from September 20, 1966 to December 31, 1973. Exhibit D to the Affidavit of Lester C. Migdal contains the application of Cohen, Shapiro (special counsel in Pennsylvania) for payment for legal services rendered from September, 1970 to June of 1972. Harry P. Lander seeks payment for legal services rendered to the Committee from July 15, 1961 to the "present time".

B. Amounts sought:

1.	Legal fees of Breed, Abbott		$ 76,663.20
	Disbursements of Breed, Abbott	$ 1,764.22	
	Less payment on account	900.00	
			864.22
			$ 77,527.42
2.	Legal fees of Migdal, Tenney	$1,350,000.00	
	Legal Fees of Cohen, Shapiro	4,206.00	
	Disbursements of Migdal, Tenney	47,766.88	
			1,401,972.88
3.	Legal fees of Harry P. Lander	$ 10,000.00	
	Disbursements of Harry P. Lander	1,400.00	
			11,400.00
	Total		$1,490,900.30

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Totals for all Petitions

1.	Compensation to Indenture Trustees	$ 423,816.67	
	Expenses of Indenture Trustees	187,942.53	
			$ 611,759.20
2.	Legal Fees	$4,632,382.20	
	Disbursements of Law Firms	100,901.00	
			4,733,283.20
	Total		$5,345,042.40

APPENDIX B

SUMMARY OF TIME CHARGES OF PETITIONERS' COUNSEL

The following table is set forth in as much pertinent detail as the data presented in the Petitions and supporting Affidavits would allow.

Chase Manhattan Bank, N.A. (Dewey, Ballantine, Bushby, Palmer & Wood)

1. Summary of billed time excluding work on petition for allowances.*/

Period	Wilkie Bushby Hours	Other Partners Hours	Joseph Schrieber Hours	Junior Associate Hours	Total
July 7, 1961-Nov. 15, 1964	341.2	79.1	799.9	94.6	1,314.8
Nov. 16, 1964-Nov. 30, 1968	1,334.8	13.7	3,797.2	857.2	6,007.9
Dec. 1, 1968-June 30, 1970	402.4	206.4	1,769.0	184.5	2,562.3
July 1, 1970-March 31, 1972		150.5	673.2	184.5**/	823.7
Subtotals	2,078.4	454.7	7,039.3	1,136.3	10,708.7

2. Time spent in drafting petition for allowances.***/

Apr. 3, 1969-June 30, 1970	3.0		182.3		185.3
July 1, 1970-March 31, 1972			43.8		43.8
Apr. 1, 1972-June 1, 1975		149.3	201.7		351.0
Subtotals	3.0	149.3	427.8		580.1
TOTALS (of both tables)	2,081.4	604.0	7,467.1	1,136.3	11,288.8

*/ This table is contained on page 89 of the Affidavit of Joseph Schreiber.

**/ This figure is apparently incorrect. It does not correspond with data contained in the Appendix to the Affidavit of Stuart N. Scott. If zero is substituted, the table adds correctly.

***/ This table is contained on page 99 of the Schreiber Affidavit.

Manufacturers Hanover Trust Company and A. Frederick Keuthen (Simpson, Thacher & Bartlett)*/

Period	Senior Partners	Junior Partners	Associates	Total
July 1961-August 1971	4,092.00	1,289.50	6,996.50	12,378.00
Preparation of Fee Application	238.50	96.75	189.00	524.25
TOTALS	4,330.50	1,386.25	7,185.50	12,902.25

United States Trust Company (Carter, Ledyard & Milburn)**/

Period	Partners	Associates	Summer Associates	Total
July 7, 1961-Oct. 31, 1961	87.75	231.75***/	23.00	342.50
Nov. 1, 1961-July 3, 1963	142.00	315.25	31.25	488.50
July 4, 1963-Dec. 31, 1964	185.00	199.00		384.00
Jan. 1, 1965-Sept. 30, 1966	119.50	200.25	38.00	357.75

*/ This data is calculated from Appendix 1 of the Affidavit of Horace J. McAfee.

**/ This data is calculated from Appendices A and C of the Affidavit of Walter Avery Kernan.

***/ There is an error in addition in the Affidavit in the total number of hours for this category and time period. This in turn affects all totals containing this figure. The figure and totals have been corrected for this Appendix.

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United States Trust Company (cont'd)

Period	Partners	Associates	Summer Associates	Total
Oct. 1, 1966-Dec. 31, 1968	85.25	170.75		256.00
Sept. 1965-August 1968 ("Six Months" Claims)	54.25	286.00		340.25
Jan. 1, 1966-July 2, 1970 (Inclusion Proceedings)	1,103.75	2,088.00	58.25	3,250.00
Jan 1, 1969-Apr. 1, 1975	62.50	92.00		154.50
Subtotals	1,840.00	3,583.00	150.50	5,573.50
Preparation of Fee Petition				
1969	3.75	270.75		274.50
1970	11.25	12.50		23.75
1971	3.50	60.00		63.50
1972	3.25	6.50	89.75	99.50
1973	80.50	156.00*/		236.50
1974	103.75	234.00**/		337.75
Jan 1, 1975-Apr. 1, 1975	7.25	28.50		35.75
Subtotals	213.25	768.25	89.75	1,071.25
TOTALS	2,053.25	4,351.25	240.25	6,644.75

*/ This figure contains 58.0 hours described in the Appendix as being allocated to a "Former Associate".

**/ This figure contains 5.00 and 101.75 hours described in the Appendix as being allocated respectively to a "Former Associate" and "Legal Assistants".

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New York, N.H. & H.R.R. First Mortgage 4% Bondholders Committee */
(Breed, Abbott & Morgan)

Period	Partners	Associates	Total
July 8, 1961-Feb. 3, 1967	377.8	1,060.1	1,437.9

New York, N.H. & H.R.R. First Mortgage 4% Bondholders Committee **/
(Migdal, Tenney, Glass & Pollack)

Period	Senior Partners	Partners	Senior Associates	Associates	Total
Sept. 1966-Dec. 31, 1966	234.75	410.75	348.25		993.75
Jan. 1, 1967-June 30, 1967	412.00	983.75		17.50	1,413.25
July 1, 1967-Dec. 31, 1967	260.00	716.75		119.25	1,096.00
Jan. 1, 1968-June 30, 1968	511.75	817.25		9.00	1,338.00
July 1, 1968-Dec. 31, 1968	416.25	776.75			1,193.00
Jan. 1, 1969-June 30, 1969	477.25	705.00			1,182.25
July 1, 1969-Dec. 31, 1969	163.00	557.00		225.25	945.25
Jan. 1. 1970-June 30, 1970	443.00	679.50		164.50 ***/	1,287.00
July 1, 1970-Dec. 31, 1970	145.00	189.00			334.00
Jan. 1, 1971-June 30, 1971	86.50	208.50			295.00
July 1, 1971-Dec 31, 1971	258.50	329.75	53.00		641.25

*/ This data is contained in a table on page 3 of the Affidavit of Lloyd V. Almirall.
**/ This is a summary of the table contained in Exhibit B to the Affidavit of Lester C.Migdal.
***/ This figure is allocated in the Exhibit to a "Law Clerk".

Jan. 1, 1972-June 30, 1972	71.25	156.00			227.25
July 1, 1972-Dec. 31, 1972	67.00	93.50	17.50		178.00
Jan. 1, 1973-June 30, 1973	71.00	83.50			154.50
July 1, 1973-Dec. 31, 1973	176.25	86.00			282.25 */
TOTALS	3,793.50	6,793.00	418.75	535.50	11,540.75

New York, N.H. & H.R.R. First Mortgage 4% Bondholders Committee (Cohen, Shapiro, Polisher, Shiekman and Cohen) **/

Total time spent 59.10 hours

New York, N.H. & H.R.R. First Mortgage 4% Bondholders Committee (Harry P. Lander)

No time charges included in the Affidavit.

Totals of Legal Time Spent by all Petitioners' Counsel except Cohen, Shapiro and Harry P. Lander

Partners	Associates	Total
21,419.70	22,394.75	43,814.45

*/ This figure from the table in Mr. Migdal's Exhibit apparently reflects a typographical error; the logged hours do not total to it, and the total for all hours does not correspond with it. The apparent correct number is 262.25

**/ This data is taken from the billing report sheets in the Appendix to the Application of Cohen, Shapiro.

In The

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor	No. 30226

REPLY OF MANUFACTURERS
HANOVER TRUST COMPANY

SIMPSON THACHER & BARTLETT
Attorneys for Manufacturers
Hanover Trust Company,
as former Corporate Trustee
of the First and Refunding
Mortgage of Debtor
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WHITNEY NORTH SEYMOUR,
HORACE J. McAFEE,
ALBERT X. BADER, JR.,

Of Counsel.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

In Proceedings for the
Reorganization of a Railroad

- - - - - - - - - - - - - - - - - - x

In the Matter of :

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, : No. 30226

Debtor. :

- - - - - - - - - - - - - - - - - - x

REPLY OF MANUFACTURERS
HANOVER TRUST COMPANY

Preliminary Statement

This memorandum is submitted in reply to the Statement of Position dated May 6, 1976 filed on behalf of Richard Joyce Smith, the Reorganization Trustee of the property of the Debtor (Trustee).

The Trustee's statement largely deals in general terms and in general principles with the applications of the various creditor interests which were active in the reorganization between 1961 and 1971, including the application of Manufacturers Hanover Trust Company, on behalf of itself and its counsel, as Corporate Trustee under the First and Refunding Mortgage of the Debtor (Manufacturers). Except

to the extent noted below, we do not disagree with the general discussion of the applicable law and precedents contained in pages 3 through 13 of the Trustee's statement nor with the more specific treatment of the petitions here under consideration at pages 13 through 19 thereof. We treat separately, under Point II of this memorandum, the question of an alleged conflict of interest on the part of Manufacturers during the period June 21, 1970, when Penn Central filed for reorganization, and the summer of 1971 when Manufacturers petitioned for and this Court approved, the appointment of a substitute trustee.

Point I below is a specific analysis of the recommendations of the Trustee with regard to the quantification of benefit and the method and amount of payments, which appears at pages 30 through 42 of the Trustee's statement. For convenience, we discuss under that point certain specific refinements of the Trustee's general statements which we believe are necessary in the Court's consideration of these applications.

POINT I

THE BASIS, AMOUNT AND TIMING OF COMPENSATION OF MANUFACTURERS AND ITS COUNSEL

The Benefit to the Estate Resulting from the Efforts of the Petitioners

The basic thrust of the Trustee's position is that it is necessary first to consider the benefit which the Debtor has obtained as a result of the efforts of the petitioners, taken together (page 18). In applying this principle, however, the Trustee takes as his basis for measurement the changes in the valuation of the Debtor's assets which occurred over the course of this proceeding. We submit that this approach is incorrect.* The focus of the question that was litigated in the Penn Central inclusion cases, beginning with the Second Supplemental Report

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* It also contains certain factual inaccuracies. The "double counting" of accrued taxes was $16.2 million, not $14.6 million (See this Court's "Memorandum of Decision on the Issue of the Price to be Paid for the Debtor's Assets", dated May 28, 1969).

Moreover, we fail to see why the Trustee should be credited in any way for the $3.8 million adjustment in discounting to net worth which was developed by Manufacturers' witness; the increase in value (of $4.4 million) of the Bronx Yards, a difference from the Trustee's valuation that was first developed by U.S. Trust, or the double counting of taxes, which was first noted by Chase, much less for the value of the Grand Central Terminal interest, which represented $13 million of the $125 million "rounded off" net liquidation value the Commission assigned to the New Haven assets.

of the Interstate Commerce Commission (ICC), dated November 16, 1967 (331 ICC 643) and culminating in the decision of the United States Supreme Court on June 29, 1970, in the New Haven Inclusion Cases, 399 U.S. 392, was what the New Haven was entitled to receive from the Penn Central for the assets being transferred. The question for the Commission and the courts was whether or not the New Haven was receiving consideration equal to the fair value of the assets it was selling. As the Supreme Court put it (399 U.S. at 399), "The ultimate question presented by the cases now before us is the price Penn Central must pay for the assets of the New Haven." (Emphasis supplied.)

As the Court will recall, the reorganization Trustees of the New Haven had agreed in April 1966 to sell to Penn Central certain assets of the New Haven (which constituted essentially all of its operating assets) in return for a package of consideration which consisted of 950,000 shares of Penn Central common stock, $23,000,000 of Penn Central bonds (at an interest rate not to exceed 5%), $8,000,000 cash and certain other items. For purposes of the proceedings before the Commission, the Trustees valued the bundle of assets to be received at $140.7 to $148.3 million (331 ICC at 688). $83.1 million of this represented the value ($87.50 per share) which the Trustees placed upon the 950,000 shares of stock. Thus, the balance of

the consideration was valued by the Trustees at between $57.6 million and $65.2 million. In reaching its conclusion that the agreement between Penn Central and the Trustees was fair and reasonable because the liquidation value of the New Haven assets to be conveyed and the value of the consideration to be received by the New Haven were each worth about $125 million, the Commission made various adjustments in the value of consideration to be received and arrived at a valuation of $123.6 million, made up as follows:

		Millions
950,000 shares of Penn Central stock at $87.50 a share		$83.1
$23 million principal amount of Penn Central 5% bonds	20.0	
Assumption by Penn Central of Boston & Providence Mortgage	3.0	
Purchase price adjustments under purchase agreement	9.5	
Cash	8.0	40.5
		$123.6*

For reasons with which this Court is familiar, including the provisions of Section 11.7 of the agreement between the Trustees and Penn Central, the only challenge

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* This table is drawn from Section 4 of the Opinion of the three judge court dated July 10, 1968; the analysis upon which it is based is set forth, somewhat confusingly, at 331 ICC 688-692.

to the Second Supplemental Report was that mounted by the petitioners, first in the three judge court and then in this Court. This attack was in effect twofold -- first, we questioned the Commission's conclusion that the value of the consideration to be received by the New Haven was substantially equal to the net liquidation value of the assets to be sold; and second, we attacked the valuations which the Commission had placed both on the assets to be sold and the consideration to be received.

Both this Court and the three judge court, in rejecting the Commission's Second Supplemental Report, concluded that there was in fact a substantial imbalance between the consideration to be received and the value of the assets to be transferred on the reasoning that the Commission had substantially undervalued the assets. In general, they either rejected or did not reach the companion claim of the present petitioners that the Commission had overvalued the consideration. Specifically, the First Mortgage bondholder interests did not prevail on their claim that the Penn Central stock was substantially overvalued.

On remand, the Commission again focused its attention upon the value of the assets to be conveyed. It made certain upward adjustments in the valuation of the assets, particularly an increase in the value of the Grand Central Terminal property (which the Trustees had initially valued

at zero) and the value of the Oak Point and Harlem River Yards, as well as a partial correction of certain reductions in the liquidation value (including the double-counting of taxes); and then introduced its "other pricing considerations", which purported to reduce the net liquidation value of the New Haven assets by something over $22 million. The Commission essentially continued to reject the bondholders' attack upon its valuation of the consideration to be received.

When the Commission's Fourth Supplemental Report came to this Court for review, this Court recognized the force of the argument of the first mortgage bondholder representatives that the valuation which had theretofore been placed upon the Penn Central stock, namely $87.50 per share, would only be adequate if that item of consideration were modified.* It developed the "underwriting formula", which was subsequently accepted by the three judge court, as a means to buttress the $87.50 valuation still being assigned to the Penn Central stock.** On appeal to the Supreme Court, the bondholder interests preserved their attack upon the valuation of the consideration, as well as

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* The statement on page 34 of the Trustee's Statement with respect to the price of Penn Central stock is inaccurate. While the stock had reached the 80's in 1968, before the stock was delivered to the Trustees, its highest price in 1969 was 71-3/4 in January, 1969; it had fallen to the low 50's by the date of this Court's decision. By February, 1970, when Manufacturers filed its brief in the Supreme Court, it had fallen to around 26.

** Only Judge Weinfeld rejected this approach.

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their continuing attack upon the valuation of the assets.*

We respectfully submit that it was only by preserving this attack upon the value of the consideration that the bondholders made it possible for the Supreme Court to reopen the question of adequacy of the consideration in its decision in the New Haven Inclusion Cases. Had it not been for the position of the bondholders, which they steadily maintained throughout proceedings before the Commission and in the courts, that the Penn Central stock was being grossly overvalued, the avails of the New Haven estate of the sale of the railroad assets would have been worth no more today than the $40.5 million valuation which the Commission placed upon the consideration other than the stock plus whatever speculative value the Penn Central stock would now hold.

In short, the measure of the benefit conferred upon the estate by the efforts of the bondholders is not the con iderable increase in the valuation of the assets between the Second Supplemental Report of the Commission and the decision of this Court and of the Supreme Court, which the Trustee values at $43.8 million plus $5 million of interim relief (Trustee's Statement, p. 33), but the legal basis upon which the Trustee now claims a lien upon the former as of the New Haven that were transferred to Penn Centra Taking $174.6 million as the value of the New Haven's claim upon Penn Central, as against the

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* Manufacturers, in its Petition for Certiorari and its Brief on the merits in the New Haven Inclusion Cases, noted as one of its objections to the underwriting formula the possibility that the Penn Central might become insolvent during the underwriting period. Petition for Certiorari of Manufacturers Hanover Trust Company, December 5, 1969, p. 20; Brief, p. 66.

valuation of the non-stock consideration which Penn Central was to pay to the Trustees under the original agreement of April 1966, viz., $40.5 million, the value of the claim created by the efforts of the bondholders must be taken at $134.1 million.

We by no means wish, in this analysis, to undervalue the efforts of the Trustees in negotiating the 1966 agreement with Penn Central and the firm floor which that agreement provided as the basis for the bondholders' further efforts to achieve a more equitable arrangement, nor do we question the value to the bondholders, in attacking the fairness of the April 1966 agreement, of the liquidation study which the New Haven Trustees had prepared and sponsored, and which provided a substantial part of the basis which the bondholders used in successfully urging the courts that the Commission's determinations were in error.* Moreover we recognize the fact that once their principal immediate object was accomplished by the inclusion of the New Haven in Penn Central on December 31, 1968, the Trustees, through their counsel, wholeheartedly supported the efforts of the bondholders to maximize the net valuation of the New Haven assets that had been transferred.

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* The Trustees' study assigned no value to the New Haven's interest in the Grand Central Terminal property, which the Commission ultimately valued at $28.9 million (334 ICC at 39).

While the determination of the "price" of inclusion of the New Haven was undoubtedly the principal focus and benefit of the efforts of the bondholders, the Trustee's statement of position, we submit, fails to recognize another related area in which the efforts of bondholders' counsel was essential and resulted in an important benefit to the New Haven estate, and this is the question of interim relief. As this Court will recall, interim erosion was a problem which loomed large in the considerations of this Court and of all of the parties during 1967 and 1968. Because of the terms of their agreement with Penn Central, the Trustees were not in a position to pursue that issue and it was again the bondholders through their counsel who had to bring that issue before the Commission and this Court. The bondholders took two approaches to this problem. The Committee sought to have the reorganization terminated on the grounds that the erosion had exceeded constitutional limits and, carrying out a suggestion of this Court, Manufacturers asked the Commission for interim relief in the form of a lease arrangement and drafted an outline of such a lease. Under the impetus of these initiatives, Penn Central worked out with the Trustees an interim proposal which was presented to the Commission in the fall of 1967 which was designed to implement the suggestion in this Court's decision of July 11, 1967. This resulted

in the combination of mandatory loans and a loss-sharing formula which was directed by the Commission's Second Supplemental Report (331 ICC at 699-720) and which, as the Trustee recognized, resulted in a benefit to the New Haven of approximately $5 million.

Similarly, while the Trustee recognizes in general terms that the petitioners are entitled to compensation for "watchdog" services, it would appear that those services have been completely omitted in his analysis of the fair compensation which should be paid to petitioners. Moreover, the Trustee seems to overlook the fact that as one aspect of those "watchdog" services, the petitioners, Manufacturers and Chase, actively participated with the Trustees in contesting the so-called six-months claims and in the successful defeat of that attempt to obtain treatment preferential to that of the bondholders for approximately $5 million of unsecured claims.

Timing and Amount of Compensation

General Considerations Applicable to the Petitioners as a Group

The Trustee appears to suggest at page 37, that the ultimate benefit to the estate resulting from the efforts of the petitioners, once measured, should be compensated at a rate of approximately 8 1/3% ($2,500,000/$30,000,000). He suggests, at page 39, that in view of the uncertainty

as to the ultimate amount that will be realized as an outgrowth of the New Haven's claim upon Penn Central, only half of that amount should be paid in two current installments and the balance deferred until there has been a resolution of the status of the New Haven's claim against Penn Central.

Our objections to this approach are threefold: First, as noted above, in our view the collective efforts of petitioners have conferred a benefit upon the estate far greater in value than that assigned by the Trustee, indeed one which would warrant, under circumstances other than bankruptcy, an award far greater than the approximately $5 million that all petitioners here seek.* Second, we respectfully submit that this Court is in a position to determine now the likely benefit that will be realized as a result of petitioners' efforts with sufficient accuracy to make a final award, without contingency, as to the value of the services rendered by each of the petitioners at this time. Finally, although we recognize that the Trustee has limited resources and we have no desire to impose such a strain on the Trustee's revenues that he will be

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* Even if one applies the Trustee's 50% discount for uncertainty, the benefit we calculate to have accrued to the Debtor, compensated at 8-1/3%, would support a fee award now of over $5.5 million. This calculation leaves out of account the value of so-called "watch-dog" services as well as other special efforts of the Petitioners, e.g., the six-month claims.

prevented from carrying out his responsibilities, we submit that it would be appropriate for the Court to direct the Trustee to make payments on account of the fees awarded of not less than 40% in this year and 30% in each of the next two years.

While we are not unmindful of the financial condition of the Debtor and have only a limited basis now to comment on the Trustee's investment policies, we submit that it is at least debatable that the Trustee should continue to invest exclusively in short term obligations, particularly in view of the spread between the rates for short-term and middle-term obligations and in view also of the nature of the Trustee's ongoing activities. While Connecticut's payments to the Debtor may cease in 1978, as the Trustee suggests, leaving the Estate dependent on its investment income, it would seem that the Debtor's expenses are also likely to become relatively stable with the foreseeable end of settlements of tort and per diem claims. Under these circumstances, it would not seem unreasonable for the Debtor, without sacrificing safety, to look to a larger annual income. For example, two year U. S. government bonds offer virtually equal safety with interest around 7% and it is common knowledge that interest rates on short-term obligations have increased markedly in the last few weeks. Even if half of the Debtor's funds were so invested, the income of the Debtor should increase by $200,000.

Specific Considerations bearing on the fee application of Manufacturers

The application shows that Simpson Thacher & Bartlett expended a total of 13,039 recorded hours in this proceeding, 4,380.50 of which represented senior partners' time, 1,434.75 junior partners' time and 7,223.75 associates' time.* As we discuss in detail below, the total hours recorded may be broken down into the following categories of legal services: 3634.25 hours on "watchdog" activities, including, for this purpose, the "6 months claims"; 8890.50 hours on the Inclusion litigation (including research, briefs, hearings, trials and appeals); and 524.25 hours on the fee application.

We concur with the Trustee's view that the guidelines for determining reasonable legal fees established by the Court of Appeals in City of Detroit v. Grinnell, 495 F.2d 448 (2d Cir. 1974) provide the relevant standard. However, in specifying what he believes to constitute reasonable fees in this action, we submit that the Trustee has failed to follow fully the teaching of that case. While Grinnell recognized the use of percentage of the benefit conferred as one of the relevant measures of an attorney's fee, it rejected that test as the starting point

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* No allowance is sought for the time of para-legal employees.

of its analysis. The Court of Appeals said, "The starting point of every fee award . . . must be a calculation of the attorney's services in terms of the time he has expended on the case." The fact that the Trustee labels certain hours worked non-compensable does not require a "modified approach." Cf. Blank v. Talley Industries, Inc., 390 F. Supp. 1 (S.D.N.Y. 1975) (Weinfeld, J.).

Once the number of hours reasonably spent has been ascertained, Grinnell dictates that a reasonable hourly fee be set and multiplied by time expended. Once this basic calculation has been made, less objective factors should be taken into account to determine whether the base figure so obtained should be adjusted. Foremost among these factors is the "risk of litigation", i.e., whether the attorneys were working on a contingent basis and if so whether the probability of success was great or small. In answering the second question, the Court of Appeals said it is relevant to consider whether the issues involved were novel and complex or straightforward and well-worn. Other factors that the post-Grinnell decisions have taken into account include the result achieved, the skill, experience and standing of counsel, the magnitude of the undertaking and the quality of opposing counsel. The Trustee does not address these factors.

To the extent that the outcome of the proceedings weighs heavily in determining its compensation, Simpson Thacher's employment was inherently contingent. In fact, Simpson Thacher agreed with Manufacturers to look to §77(c)(12) for its legal fee. The Trustee's reliance on the result achieved as a gauge of reasonable compensation is evidence of the risk the firm ran of not getting paid in the event of an unsuccessful result. The fact that the Interstate Commerce Commission initially sustained the fairness of the original agreement reflects the extreme uncertainty that existed as to the final outcome of this proceeding when it began in late 1966.

This court is well aware of the unique issues, and the complexity and magnitude of the legal and factual questions that confronted petitioners in developing persuasive arguments that were eventually adopted, to the benefit of the estate, by the United States Supreme Court in its lengthy opinion in the New Haven Inclusion Cases. At various times, over 50 Simpson Thacher & Bartlett attorneys were involved in this proceeding, frequently working well into the early hours of the morning and through weekends.

Almost all the work performed was under the constant supervision of Mr. McAfee, a senior member of Simpson Thacher with over 40 years of legal experience, including,

since 1932, substantial involvement with reorganizations of all kinds, including reorganizations of railroads and other utilities. Whitney North Seymour, the senior member of the firm, and past president of the American Bar Association, the New York City Bar Association, The American College of Trial Lawyers, the Institute of Judicial Administration and the American Arbitration Association, personally took charge of the briefing and argued the appeal before the United States Supreme Court. He was opposed not only by the well-known New York firm of Debevoise, Plimpton, Lyons & Gates but also by the well-known Washington firm of Covington & Burling ard also by counsel for the United States. The hours Mr. Seymour and other counsel spent on behalf of Manufacturers in trying, briefing and arguing this case naturally affected their availability for other assignments.

That the interests of the Indenture Trustee were protected by skillful attorneys is undeniable. The overwhelming victory won for the estate could not have been gained with less than the all-out effort that was made.

Considering the factors discussed above, we believe that the normal hourly rates provide adequate and just compensation for the "watchdog" and fee application services performed by Simpson Thacher & Bartlett. The more complex

work done in connection with the New Haven Inclusion Cases should be compensated at no less than 1.7 times the hourly rate. This multiple is moderate when compared with awards of post-Grinnell cases of comparable difficulty. Judge Metzner, in Grinnell on remand, 68 Civ. 4026 (April 21, 1976), multiplied the hourly rate by 3 for litigation-related services. In Gilman v. Mohawk Data Sciences Corp., 71 Civ. 4742 (May 3, 1976), the same multiple was used. Judge Weinfeld used a 1.5 multiple in Blank v. Talley Industries, Inc., 390 F. Supp. 1 (S.D.N.Y. 1975).

In summary, we respectfully submit that the proper approach to a determination of the fee to be allowed for the services of Simpson Thacher & Bartlett (ST&B) is as follows:

> (a) award a fee for services rendered by ST&B for "watchdog" services (including the six-months claims) and preparation of the fee application on the basis of an average hourly rate of $130 for senior partners, $100 for junior partners and $60 for associates;*
>
> (b) award a fee for services rendered by ST&B in the inclusion case on the basis of the same average hourly rates, multiplied by a factor of 1.7.

Based upon an analysis of ST&B's time records by counsel, we have arrived at the following allocations of services:

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* These fees are those normally charged, on average, by Simpson Thacher & Bartlett. We believe they are similar to those charged by New York firms of comparable size and expertise.

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	"Watchdog"*	Fee Application**	Inclusion
Senior Partners	1002.50	238.50	3139.50
Junior Partners	145.25	96.75	1192.75
Associates	2486.50	189.00	4548.25

On this basis, we calculate our fee as follows:

(a) "Watchdog" and Fee Application:

	Hours	Rate	Amount
Senior Partners	1241.00	130	$161,330
Junior Partners	242.00	100	24,200
Associates	2675.50	60	160,530
			$346,060

(b) Inclusion Litigation:

	Hours	Rate	Amount
Senior Partners	3139.50	130	$408,135
Junior Partners	1192.75	100	119,275
Associates	4548.25	60	272,895
			$800,305

Adjustment Factor: 1.7 - $1,360,518.50

Total Fee $1,706,578.50***

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* This includes work on the "6 months claims". The allocation of "watchdog" services has been made on the basis of a review of the assignments of various ST&B attorneys and, in those few cases where allocation was necessary, primarily with respect to Mr. McAfee, on the basis of individual time charges. As a cross-check, hours recorded per year by each category of attorney was calculated, allocating all hours prior to 1967 to watchdog services and all hours after 1970 to fee application. (A table showing such data is attached hereto as Exhibit I).

** See Appendix I, p. 3 to McAfee Affidavit.

*** In arriving at our fee request in the application, ST&B employed a different method, viz.: we applied to the individual hours recorded by each attorney in each year our 1974 hourly rate for attorneys of his then standing (senior partner, junior partner, associate of 10 years standing, etc.) and then added approximately $500,000 in view of the difficulty of the work, the uncertainty of compensation and the success achieved.

At this point, it is relevant to discuss whether any hours recorded reflect non-compensable activities. The Trustee's argument on this issue focuses entirely on what he terms "duplicative" services by the various petitioners in their work on the Inclusion proceeding. Since no allegation of duplication is made with respect to either the time spent performing "watchdog" services or to the time spent on this fee application, we believe no reduction can be made in the figures submitted with regard to these two areas.

We also reject the Trustee's contention that the cooperative effort of petitioners in litigation of the greatest complexity that resulted in extraordinary benefits to the estate amounts to non-compensable duplication of services. What took place was a coordinated effort by experienced attorneys working together in common pursuit of a single end, meeting on all occasions over a period of years the demands of the case whenever they arose. Had it been possible for a single firm to act for all parties, the time and effort required would not have been reduced. For example, during cross-examination of witnesses at trial, attorneys for various claimants usually participated,* but

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* In the case of witnesses sponsored by various petitioners, preparation and presentation were handled individually.

the questions were not duplicative.* This is cooperation, not duplication.

This Court should, we submit, not lose sight of the fact that the petitioners, in light of their responsibilities as fiduciaries, could not feasibly or ethically have turned over to other parties responsibility for matters of such great import.**

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* Indeed, both of the Commission's Hearing Examiners, Messrs. Present and Clerman, not only made clear that they were under an injunction to prevent duplication, but intervened to enforce this rule stringently. The hearing conducted by Mr. Clerman, the so-called "Remand Hearing" was governed by special procedures established by the Commission designed to make it brief, which not only barred duplication, but redirect examination.

** Judge Congers in In re New York, Ontario and Western Railway Co., 171 F. Supp. 634, 639-640 (S.D.N.Y. 1958), said the following in answer to a contention identical to the one made here by the Trustee:

> "True, many of the problems were matters for the Trustee, but these parties and attorneys often disagreed with him. Again, these attorneys largely represented different interests. Certainly, in all good judgment, one could not expect the attorneys for one Trust Company to turn over its problems to the attorneys for another Trust Company. I kept the number of intervenors down. It does not seem to me that there was any material duplication here."

Judge Weinfeld recognized that attorneys working to the same end may be cooperating and not duplicating in Levin v. Mississippi River Corp., 377 F. Supp. 926 (S.D.N.Y. 1974), a class action by Class B stockholders of the corporation to compel payment of reasonable dividends. Three law firms were involved in the case: Donovan, Leisure, Newton & Irvine for Allegheny Corporation, the majority Class B shareholder; Orans, Elsen & Polstein for one named plaintiff and Pomerantz, Levy, Haudek & Block for the other named plaintiff. The Court, noting that Allegheny, as the majority shareholder, had somewhat different interests than the minority class, said separate counsel was "fully justified" and allowed Donovan's $850,000 claim in full. As to the joint application of the other two firms, the court awarded $1,750,000 of $2,000,000 requested. Judge Weinfeld found that the two firms "cooperated" in their efforts.

POINT II

THERE WAS NO CONFLICT OF INTEREST ON THE PART OF MANUFACTURERS SUBSEQUENT TO PENN CENTRAL'S DEFAULT SUCH AS TO WARRANT ANY REDUCTION OF THE FEES AND EXPENSES REQUESTED BY MANUFACTURERS

At the outset, the distinctions between the fiduciary duty of a testamentary or similar trustee and that of an indenture trustee under a corporate mortgage, both prior to and subsequent to default, should be noted. Prior to the enactment of the Trust Indenture Act of 1939 ("Act"), 15 U.S.C. §§ 77aaa-77bbbb, the courts had a great deal of difficulty reconciling the limitations on the power of the indenture trustee with the general responsibilities of a "trustee." The term "trustee" connotes a fiduciary who is to protect the interest of his cestui, whereas the deed of trust or corporate mortgage normally limited, defined and specified the powers, duties and obligations of the indenture trustee. Moreover, the indenture trustee was required not only to protect the interests of its cestui (the security holders) but also those of the issuing company. See, McClelland & Fisher, Law of Corporate Mortgage and Bond Issues, 791-92 (1937); Posner, Liability of the Trustee Under the Corporate Indenture, 42 Harv. L. Rev. 198, 199-200 (1928). Another distinction noted by the courts was that a personal trustee assumed active management

of the trust, whereas active management was assumed by the indenture trustee only subsequent to default. McCollon, The Securities and Exchange Commission and Corporate Trustee, 36 Col. L. Rev. 1197, 1202 (1936). One writer concluded that:

> "[t]o regard the corporate trustee as a mere stakeholder is to understate its responsibilities; to treat it as though it were an ordinary trustee is to overstate the extent of its duties and subject it to a standard of conduct not required by the nature of the trust." Posner, Liability of the Trustee Under the Corporate Indenture, 42 Harv. L. Rev. 198, 199-200 (1928) (Footnotes omitted).

Moreover, a corporate trustee's duties were seen as primarily passive before default:

> "The trustee's duties under instruments like those in suit are before default mainly passive. It holds the legal title of the securities pledged as trustee for the bondholders. But the mortgagor for the most part retains control and management of the mortgaged property. The mortgagor was entitled to the interest on all bonds and the dividends on all stock pledged. The trustee was a mere custodian and had no active duties except as specified." Colorado & S. R. Co. v. Blair, 214 N.Y. 497, 510-11, 108 N.E. 840, 842 (1915).

Upon the occurrence of a default it was recognized that if the corporate trustee was acting under another indenture of the issuer, a potential conflict arose. The usual course of action in this situation was for the corporate trustee to resign voluntarily from all but one indenture. Miller, The Trust Indenture Act of 1939, 25 Cornell L.Q. 105,

108 (1939). Another possible solution was the retention of separate counsel for each indenture. Posner, The Trustee and the Trust Indenture: A Further Study, 46 Yale L.J. 737, 792 (1937).

The Trust Indenture Act of 1939, which essentially codified the practices of the more responsible institutions of the day, now provides general guidelines for all indentures, regardless of whether the indenture is required to be qualified under the Act. J. Kennedy, Corporate Trust Administration, 36-38 (1961). Even though railroads, as common carriers, are exempt from the provisions of the Act under §304(a)(4)(A), the conduct of an indenture trustee acting under such an indenture may properly be evaluated in terms of the standards of the Act.

The purposes of the Trust Indenture Act of 1939, following the recommendations of the investigatory committee appointed by the Securities and Exchange Commission, were stated by the House Committee to be:

> "(1) To provide full and fair disclosure, not only at the time of original issue of bonds, notes, debentures and similar securities, but throughout the life of such securities.
>
> "(2) To provide machinery whereby such continuing disclosure may be made to the security holders, and whereby they may get together for the protection of their own interests.

> "(3) To assure that the security holders will have the services of a disinterested indenture trustee, and that such trustee will conform to the high standards of conduct now observed by the more conscientious trust institutions." H.R. Rep. No. 1016, 76 Cong., 1st Sess. (1939).

As House Report No. 1016 indicates, the Act in effect codified the practices that had been developed and were then being followed by the leading corporate trust departments. Thus the Act, in defining the fiduciary obligation of the indenture trustee, still distinguishes between duties prior to and subsequent to default. Prior to default the trustee's duties may be limited by an indenture provision to "such duties as are specifically set out in such indenture." Section 315(a)(1). Section 315(c), on the other hand, requires that the indenture include provisions requiring the trustee "to exercise in case of default . . . such of the rights and powers vested in it . . . and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs." The trustee, of course, is under a fiduciary obligation to the security holders throughout the life of the indenture (see, Woods v. City National Bank & Trust Co. of Chicago, 312 U.S. 362 (1941)), but the above distinction demonstrates that the fiduciary's obligations change substantially following a default, at which time the trustee's duties

become involved with the active management of the issuer's affairs.*

Section 310(b) of the Act enumerates nine relationships, only one of which is applicable here, in which a trustee is deemed to be representing conflicting interests. Under §310(b)(1) a trustee is deemed to have a conflicting interest if "such trustee is trustee under another indenture under which any other securities, or certificates of interest or participation in any other securities, of an obligor upon the indenture securities are outstanding." Section 310(b)(1)(ii), however, permits the issuer to demonstrate to the SEC, by submitting an application pursuant to Section 310(b)(1), that no material conflict of interest would arise. Thus, dual trusteeship does not per se create a conflict of interest.

When the potential conflict of interest arose, as a result of Penn Central's default, Manufacturers successively followed two of the courses of action which were generally accepted practies of indenture trustees. First, it used separate counsel for the Penn Central Indentures.

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* Even this rule applies only analogously in the case of a Section 77 reorganization (or a Chaper X reorganization), since the active management of the issuer's affairs falls under the control of the Reorganization Court and its Reorganization Trustee.

Second, it resigned voluntarily under the New Haven Indenture.*

On June 21, 1970, as a result of Penn Central's default, the role of Manufacturers, as Trustee under Penn Central indentures, changed to one requiring active participation and there was an obvious potential for conflict. As early as July 1, 1970, Manufacturers concluded that it should seek replacement trustees in order to eliminate the possibility of conflict.

It was known from the outset that this process would be difficult and time-consuming because there were virtually no eligible banks which were not creditors of the Penn Central. It was not then anticipated that the conflict problem would become acute for some time. In fact, however, immediately upon the Supreme Court's decision in the New Haven Inclusion Cases and before remand to the Commission, this Court had to come to grips with the content of the remand order, specifically, the question of an equitable lien and a constructive trust on the New Haven assets transferred to Penn Central on December 31, 1968.

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* After much effort Manufacturers was able to induce Sterling National Bank & Trust Company of New York to act as successor trustee to Manufacturers under the Gold Bond Mortgage and on March 1, 1976 said trust company became the successor trustee pursuant to orders of Judge Fullam dated September 4, 1975 and December 30, 1975. Manufacturers continues to act as trustee under the other Penn Central indentures.

which the New Haven Reorganization Trustee, as well as the New Haven Indenture Trustee, Chase Manhattan Bank, N.A., as Trustee under the General Income Mortgage, and the First Mortgage 4% Bondholders Committee sought to have recognized. The Penn Central interests, including the trustees under Penn Central's mortgages, opposed this position. Manufacturers, by reason of its trusteeships, had cestius on both sides of the controversy. Separate counsel were made responsible for each group's interests. It was counsel who formulated and argued the issue, which was a legal one. As noted above, such a practice was considered valid prior to the enactment of the Trust Indenture Act and, we submit, in view of the situation presented and the speed with which it arose, the interests of both groups of bondholders were properly protected; indeed, in the circumstances, we submit that no other course would have been a responsible one.*

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* Without conceding that it is not entitled to full compensation for the period June 21, 1970, the date of the filing and approval of Penn Central's petition for Reorganization under Section 77 of the Bankruptcy Act and August 30, 1971 the date Mr. Iannotti's appointment as successor trustee became effective, Manufacturers, in order to save the time and trouble of the Court and to assist in expediting this proceeding, is willing to exclude from its application for an allowance any claim for compensation for Extraordinary Services rendered during that period. This will result in a reduction of its claim for Extraordinary Services from $304,416.66 to $268,666.66. Manufacturers believes, however, that its counsel, Simpson Thacher & Bartlett, should be compensated for their services rendered during that period.

The situation was clearly unavoidable. The issues on remand had to be faced and faced promptly and properly - and the interests of the cestuis under both the New Haven Indenture and the Penn Central Indentures had to be protected by qualified trustees and informed counsel. As Kelley Drye & Warren, counsel on the Penn Central Indentures, noted in its petition to intervene in the Penn Central reorganization proceedings,

> "However the situation came about, we and Manufacturers have decided, I believe correctly, that its duty to the bondholders under these mortgages requires us to intervene in this proceeding as soon as we can, rather than leaving them unrepresented until (and if) separate trustees and counsel, unconnected with this reorganization, can be found for each trust."

Admittedly, a potential conflict of interest existed, which Manufacturers had already recognized and sought to avert. The essence of the problem Manufacturers faced was that it ran the risk of breaching its fiduciary duty to one group of bondholders or the other if it failed fully to represent their interests during the time before it could resign.* The chronology of events demonstrates this fact.

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* The Trustee's discussion of the conflicts question is based on Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262 (1941). As the Trustee notes, "the essential basis for the disallowance of these claims by the reorganization court was that the claimants were pursuing interests of their own that were either of no benefit to the estate or, more often, were adverse to it." (Trustee's Statement, at 24). Woods, therefore, is inapposite since Manufacturers neither pursued any interest of its own nor purshed any interest adverse to the estate. As we show above, and as the Trustee has conceded, its efforts were of great benefit to the estate, and, recognizing the need for its services, Manufacturers felt it could not in good faith resign prior to the decision on remand.

On June 21, 1970, the Penn Central petitioned for reorganization; a week later, the Supreme Court remanded the New Haven Inclusion Cases to this Court. Early in July, 1970, Manufacturers decided to try to find successors and resign under its New Haven and Penn Central Indentures. In August, 1970, while Manufacturers was trying to find successor trustees, this Court, on August 10, entered its Order on Form of Order on Remand for Further Proceedings in the New Haven Inclusion Cases, which called for the filing of statements of position. The need for an equitable lien and a constructive trust was clear to the New Haven interests and it was also clear that unless a Successor Trustee could be found, the interests of either one group of bondholders or the other would have been adversely affected by the resignation of its Trustee at this critical stage in the litigation.*

Thus, by August, 1970, the potential conflict Manufacturers had recognized in July had to be confronted

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* To illustrate the problem Manufacturers faced, the only briefs to this Court on behalf of the Penn Central interests dealing with the controversy over the priority of liens on the Grand Central Terminal Properties were those filed by counsel to the Trustee under the Gold Bond Mortgage. In the case of the New Haven, and particularly in connection with the hearings before Judge Van Voorhis, counsel for Manufacturers had by far the greatest familiarity with the record in the Biltmore case, and thus it was in a particularly advantageous position to meet this argument economically and quickly. Presumably, Kelley Drye had similar advantages over any new counsel who might have been brought in on short notice to represent new trustees under the Penn Central Indentures.

and Manufacturers was compelled as a fiduciary to see that the interests of both the New Haven and Penn Central Bondholders for whom it was Trustee were protected. The problems Manufacturers faced in finding successor trustees were serious in both the case of the New Haven and the case of the Penn Central, but the problems in the latter were in some respects more difficult than in the former. The common problem was the practical one that it proved impossible to find qualified successor corporate trustees under any of the Indentures. The special problems in the case of the Penn Central were two-fold. First, the Penn Central Reorganization Trustees, presumably reflecting the views of the Penn Central Reorganization Court, indicated that they were, initially at least, opposed to such an effort since they wished to avoid the complications which would arise if one Trustee with one counsel was to be replaced by 17 separate Trustees with 17 separate counsel. Second, the Penn Central was an operating railroad with the myriad day-to-day problems associated with such an operation, which required consideration of the Indenture Trustee.

Manufacturers' situation vis-a-vis the New Haven was rather different. In the first place, in view of the relatively simple debt structure of the New Haven, there would be no complication of its problems if the Indenture Trustee were to be replaced, and no obstacles were therefore

raised by the Reorganization Trustee or this Court. In the second place, since the New Haven's assets were essentially securities and a lien, its administration did not present the difficulties that are inseparable from the reorganization of an operating railroad, particularly one in its early stages. This fact, in turn, tended to minimize the impact on the New Haven of the first problem Manufacturers found under all the Indentures, viz., the unavailability of a corporate trustee.

Primarily as a result of the need for further proceedings before the ICC consistent with the remand of the New Haven Inclusion Cases, Manufacturers delayed filing its petition for the appointment of a successor Trustee until June 22, 1971, because it felt that its resignation prior to this Court's decision on the Order of Remand on Judgment of the Supreme Court in the New Haven Inclusion Cases might have been detrimental to the interests of the New Haven First Mortgage Bondholders. It did not appear that there would be any detriment if a successor were appointed in July, 1971. Manufacturers was relieved as Trustee under the New Haven Indenture - and replaced by Lawrence Iannotti, as individual trustee - effective August 30, 1971.

Summary

In view of the foregoing, we submit that as Trustee Manufacturers recognized the possibility of a potential conflict of interest and acted immediately to avoid any impropriety. Since successor trustees could not be found during this critical period in the early summer of 1970 and since, moreover, a substitution at that stage would have been detrimental to the bondholders, Manufacturers continued to act as Trustee under both the New Haven and Penn Central mortgages, through separate counsel, in order to avoid the blatant breach of fiduciary duty that would have resulted from a voluntary resignation without a successor, at a time when the bondholders of each railroad plainly needed competent representation.

In these circumstances, we submit there was no impropriety on the part of Manufacturers in continuing to act as Trustee in spite of the conflicting interests among its cestuis; indeed, that it would have been a gross impropriety and a breach of its fiduciary obligations for Manufacturers Hanover to have acted in any other fashion. Based on all the foregoing circumstances and against the background of these proceedings, we respectfully submit that there is no occasion for the application to Manufacturers of any punitive rule which might be involved in other types of potential conflicts.

CONCLUSION

We respectfully submit that the application of Manufacturers for compensation and reimbursement of expenses (including attorneys' fees) should be in all respects granted.

Respectfully submitted,

SIMPSON THACHER & BARTLETT
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Hanover Trust Company,
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WHITNEY NORTH SEYMOUR,
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ALBERT X. BADER, JR.,

Of Counsel.

EXHIBIT I

Year by Year Allocation of Attorneys' Recorded Time

Year	Senior Ptnrs.	Junior Ptnrs.	Associates	Total
1961	115.25	1.00	225.75	342.00
1962	95.50	9.00	180.25	284.75
1963	138.25	54.50	19.75	212.50
1964	101.00	34.50	3.75	139.25
1965	198.50	22.25	325.00	545.75
1966	304.00	8.25	611.75	924.00
1967	761.75	-	1,848.00	2,609.75
1968	986.00	2.75	2,254.50	3,243.25
1969	713.00	676.50	894.25	2,283.75
1970	565.00	388.00	539.25	1,492.25
1971*	163.75	141.25	132.50	437.50
Preparation of Application	238.50	96.75	189.00	524.25
Total	4,380.50	1,434.75	7,223.75	13,039.00

* Includes 71.25 hours (12 Senior Partner, 22 Junior Partner and 37.25 Associates) not identified by year, which are allocated to "watchdog services".

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

A 3 5 8

In The Matter of	:	
	:	30226 Bankruptcy
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY	:	May 18, 1976
		At Bridgeport

BEFORE: THE HONORABLE ROBERT P. ANDERSON, U.S.C.J.

HEARING ON PETITION OF NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY FIRST MORTGAGE 4½ BONDHOLDERS COMMITTEE RENEWING ITS APPLICATION FOR AN ALLOWANCE FOR EXPENSES INCURRED FROM JULY 8, 1961 TO DECEMBER 31, 1973 IN CONNECTION WITH THESE PROCEEDINGS (Petition for Order No. 802)

BEST COPY AVAILABLE

CAROL J. BEECHER, C.S.R.
COURT REPORTER
741 SOUTH MERIDEN ROAD

APPEARANCES:

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CARTER, LEDYARD & MILLBURN
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PROFESSOR JAMES [illegible]
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54 Meadow Street
New Haven, Connecticut 06506

ZELDES, NEEDLE & COOPER
333 State Street
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By: JACOB D. ZELDES, ESQ.

THE COURT: We will take up Docket Number 30226, in the matter of the New York, New Haven and Hartford Railroad in Bankruptcy. I think Mr. Pollack, you had already started when you were interrupted, and I take it you wanted to say something to the Court. I am going to ask counsel if they will identify themselves because we are very happy to have the Court Reporter which but for her kindness, Mrs. Beecher, we would not have one, I take it, and she, of course, has not been in the case before and is unacquainted with names and identification of counsel.

MR. POLLACK: Lawrence W. Pollack, P-o-l-l-a-c-k, for the First Mortgage Bondholders Committee.

Your Honor, I first wanted to clear up a technical matter. The first item on the calendar today is listed as Petition for Order No. 802 which was our application for renewing the earlier application in respect of these.

Your Honor may recall at the last hearing on these matters it was determined that such a formal petition for renewal was unnecessary and that the earlier petitions would be scheduled

for hearing today without for a petition for renewal. Nevertheless, Your Honor signed an order of notice, but I was not aware of it so that technical service of the Petition of Renewal was not made, and I think it best to keep the record straight that as a technical matter, Petition for Order No. 802 be withdrawn but, of course, nevertheless, the hearing in respect of the Bondholders Committee application for allowances for expenses be continued and heard this morning.

THE COURT: And what was the number of that? Do you remember?

MR. POLLACK: I don't think it was assigned a separate number.

THE COURT: It never had a number?

MR. POLLACK: I don t think any of the applications for allowances were assigned particular numbers.

THE COURT: That is, those made before the Inter State Commerce Commission?

MR. POLLACK: That's correct. They were made here and referred -

THE COURT: But they came to the court for the purpose of being forwarded -

MR. POLLACK: To the Inter-State Commerce.

THE COURT: -- to the Inter-State Commerce Commission, and you don't know what --

MR. POLLACK: What the date was?

THE COURT: No. No. The number.

MR. POLLACK: I don't believe they were assigned a number at the time.

MR. MAIER: Your Honor issued a Memorandum in respect to the various applications, but it contained no order number.

THE COURT: I take it everyone understands what it is, and as you say, it's a purely technical matter. 802, of course, does at least incorporate by reference the earlier petition.

MR. POLLACK: That's correct, Your Honor. I am informed that the office of the trustees did send out to all the parties who customarily receive notices of these hearings a printed copy of that petition with your order of notice, so everybody is on notice anyway.

THE COURT: All right. Very well. Now, do you wish to proceed or do you have some other order? You gentlemen haven't discussed

this with each other as far as --

MR. POLLACK: Within limits we have, Your Honor, and I think we have sort of a proceeding. I think I would proceed in this fashion and merely state to the Court that the petition of the Bondholders Committee was filed, that a sworn affidavit of Lester C. Migdal with respect to the application of the firm of Migdal, Tenney, Glass and Pollack was filed; a sworn affidavit of Lloyd Almiral (sic) was filed in respect of the application of Breed, Abbott and Morgan, and a sworn affidavit of Harry P. Lander was filed in respect of his application.

Mr. Migdal is available here in the courtroom for cross examination. Mr. Lander is here in the courtroom available for cross examination. There is a representative from Breed, Abbott and Morgan in the courtroom, and I would just herewith tender Mr. Migdal for cross examination. I see no real purpose in having him give direct examination to state that that was his affidavit and that he swears to it again. If that procedure is acceptable to Your Honor.

THE COURT: Yes. I think that is

entirely satisfactory. Does anyone wish to comment on that?

PROFESSOR MOORE: Your Honor, I am James William Moore, Counsel for the New Haven Trustee. We have no objection to that procedure and do not wish to cross examine.

THE COURT: Very well.

MR. POLLACK: Fine. Mr. Migdal would like to make a statement after all the testimony is in today with respect to the application. Thank you, Your Honor.

THE COURT: I take it that is argument and not testimony.

MR. POLLACK: That is argument and not testimony, Your Honor.

MR. BADER: May it please the Court, my name is Albert A. Bader, Jr. I am a member of the firm of Simpson, Thacher and Bartlett. I appear here on behalf of the Manufacturers Hanover Trust Company as former First Trustee of the First and Refunding Mortgage or Debtor.

Your Honor, with one modification I would propose to adopt the same procedure as Mr. Pollack proposed. As Your Honor is aware there is on file with this court a Petition for

Allowance of Fees and Expenses on behalf of Manufacturers Hanover Trust Company which incorporates an affidavit as to the services of Simpson, Thacher and Bartlett of Mr. Horace J. McAfee. There are a number of exhibits that are affiliated with that document.

There is also an affidavit of Mr. Frank Kaestner who is a Vice President of Manufacturers Hanover Trust Company.

MR. McAfee is here in court and prepared to testify should any party desire to cross examine him with respect to the materials pertinent to Simpson, Thacher and Bartlett. We're all in this case. And Mr. Robert Byrne a Vice-President of Manufacturers is here basically also to perform a similar role with respect to the services of the Trust Company. I would, however, Your Honor, in view of a comment in the Trustee's memorandum ask leave of the Court to put Mr. Byrne on briefly to review and answer certain questions that I think may arise as to the nature of the Trust Company services.

THE COURT: You want to do that now?

MR. BAER: Either now or if Mr. Stanton would prefer, perhaps we can get out of the way all

matters other than that. May I first ask if anyone wishes to cross examine Mr. McAfee?

PROFESSOR MOORE: No cross examination.

MR. STANTON: Your Honor, my name is Louie Stanton of Carter, Ledyard and Millburn for the United States Trust Company as trustee of the Harlem River Division Mortgage, and the Trust Company's petition and supporting affidavits and exhibits have been duly served and filed. The affidavits in support are made by Walter Avery Kernan as to the great bulk of the application, by Sinclair Armstrong as to most of the balance and by a Mr. Baker as to a relatively smaller amount. Mr. Kernan is not present in the courtroom having died some three-quarters of a year ago, nor are Messrs. Armstrong or Baker, although they will be produced if there is any cross examination requested of them. If there is cross examination desired I am faced with a hearsay problem, but I trust that there won't be.

PROFESSOR MOORE: No, Your Honor. No cross examination. Understand, of course, that I am not admitting any legal conclusions. I may make any legal argument to all of you gentlemen that I can think of later on.

MR. STANTON: I appreciate the waiver of cross examination.

THE COURT: Yes. I think that was reserved in your Answer in each case.

PROFESSOR MOORE: Sir?

THE COURT: I think that you made that statement in your Answer, didn't you, to each Petition?

PROFESSOR MOORE: Yes, sir.

THE COURT: Very well.

MR. BADER: Your Honor, if I may, I call Mr. Robert A. Byrne.

R O B E R T A. B Y R N E, called as a witness, having been first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BADER:

Q Will you state your full name and address for the record?

A Robert A. Byrne, B y-r n-e. 35 Elliott Road, Great Neck, New York.

Q Mr. Byrne, I believe you have testified previously in this matter; is that correct?

A Yes. I have.

Q And I think you have already identified yourself as a Vice-President of Hanover Trust Company. Is that your present position?

A Yes, sir.

Q Are you familiar with the affidavit of Frank W. Kaestner which has been filed in this proceeding?

A I want to correct one other thing. He is a Senior Vice-President.

Q Forgive me.

A Yes. I am.

Q If you will have mercy on my voice. I will ask the minimum number of questions. I would like you in support, Mr. Byrne, to describe as briefly as you can the basis of the claim for extraordinary allowance that is made by Manufacturers Hanover Trust Company in this proceeding?

A To begin with, as most Trust Companies, Manufacturers Hanover does not keep hourly time records of the work which the Corporate Trust Department officers perform. We do not deal in time as such, but we determine competitive price for any given assignment on a particular job basis or in this case, since it is a continuing -- was a continuing situation, based on an annual fee.

Q What are the factors that determine the annual fee that you are requesting in this proceeding?

A Well, specifically, we take into account the nature and the amount of work to be performed. Specifically, again in this case, the mortgage that we acted as trustee for was a system mortgage so that we felt that we had to be concerned with all the debtor's property, not only cursory first mortgage. As you know, it was a first mortgage so we felt the principal responsibility for all matters that arose.

THE COURT: When did you qualify as trustee under that indenture?

THE WITNESS: 1947.

THE COURT: Do you remember when?

THE WITNESS: Specifically, I don't, Your Honor.

THE COURT: Roughly.

THE WITNESS: It was when it came out of re-organization the first time. The record will show that of the three divisional mortgages that the mortgage that we were trustee for was the largest.

BY MR. BADER:

Q Did you mean to say there were three divisional mortgages?

A 270

THE WITNESS: Three mortgages.

THE COURT: On account of the Harlem River?

MR. BADEN: There was one divisional mortgage.

THE WITNESS: There was three mortgages. One divisional mortgage to be precise. The mortgage for which we acted was originally in the principal amount of 76 million, but with accrued interest it rose to in excess of 100 million.

And also in reaching the decision as to what a fee should be in this situation, we took into consideration the novelty and the complexity of the re-organization process itself keeping in mind that this was the first chapter, first seventy-seven re-organization that involved the sale of assets under Section 5 of the Inter-State Commerce Act rather than an internal arrangement of claims to earnings.

Also involved were novel points of law, evidence and valuation theories which had to be considered. Because of all this, it required very close collaboration with counsel and review of comprehensive data throughout the whol proceeding.

A point that we also have to keep in consideration whenever we consider fees is the exposure of the Trust Company to a surcharge action where we might be subject to the claim of Bondholders that we have not performed as the Bondholders might consider that we should have. This, essentially, is a function of the amount of the issue, the priority of the lien, and of the novelty and complexity of the proceeding itself. However, also involved was the fact that as opposed to a divisional mortgage and a system income mortgage, we perceive the issue here as the range of values that were to be induced or deduced directly affected the first mortgage Bondholders. Every dollar gained or lost directly affected what the first mortgage Bondholders would receive.

As to how we arrived at our specific dollar amount figure, roughly, a third of the amount that we seek on an annual basis does not relate so much to the actual services performed, but as to the Bank's commitment of personnel and resources as needed and wherever needed to handle this, what we considered extraordinary assignment and the risk that we were exposed to, and also to

realistically the contingency of reimbursement and, again, the exposure to a possible surcharge.

Q Do you have an approximation or an estimate as to the amount of time that was spent by the Trust Officers?

A Well, we have records that indicate that we spent annually between 400 and 500 manhours a year.

Q What kind of individuals were involved in those hours, sir?

A Because of the peculiar situation surrounding this bankruptcy, very senior personnel were involved, the Chairman of the Board, the President, Executive Vice-President, the Senior Officers of the Corporate Trust Division, and all these gentlemen are men of considerable experience in reorganization matters.

Q Are there any other aspects of the work of the Trust Company that you would like to call to the specific attention of the Court?

A Well, specifically, in this reorganization we had a great deal of time spent in consultation with Bondholders of the First Mortgage. I recall specifically a great deal of time that was spent with Oscar Groos who was a holder at one time of 10 million face amount of the bonds, and he himself was considering a formulation of a plan of reorganization. He wanted to

know what positions we were taking, he was pestering us almost daily with position statements, and I'm sure most counsel present here today had some dealings with Mr. Groos at one time or another.

Q Does that complete your testimony?

A Yes, sir.

MR. BADER: Mr. Byrne is available for cross examination. Thank you, Mr. Byrne.

CROSS EXAMINATION

BY PROFESSOR MOORE:

Q Mr. Byrne, you say that Manufacturers was Trustee from 1947 on?

A Yes, sir.

Q And was Trustee at the time when the New Haven went into reorganization?

A Yes, sir.

Q Do you claim compensation to Manufacturers of approximately $304,000?

A Yes, sir.

Q With expenses of $102,000?

A Yes, sir.

MR. BADER: Professor Moore, I don't mean to interrupt your cross examination. I would point out to you I believe there is a

statement at page 28 of our brief which suggest that Manufacturers is prepared to reduce the amount of its request. I know it comes up at a different point.

PROFESSOR MOORE: I read that.

Thank you, sir.

BY PROFESSOR MOORE:

Q Do you know whether what you are seeking in the way of compensation is in excess of what Chase Manhattan is?

A Yes, sir.

Q How do you explain the difference?

A Well, as I mentioned earlier in my testimony, since we consider that we had the first mortgage on the property, that we had the primary responsibility for following the reorganization, I would consider that we spent more time and effort in the Trust Department at Manufacturers than they probably felt they were required to do at the Chase since they were holder of the second lien in effect.

Q When did the conflict of interest arise?

A Are you referring to the --

Q Well, Manufacturers did have a conflict of interest, did it not, after at least Penn Central went into reorganization?

A On June 20, 1970 when the Penn Central filed for bankruptcy, we then felt that there was a potential conflict at that time. Yes, sir.

Q And you say "potential". When did it in your mind become actual?

A Well, we did the best we could. We thought we were insolating ourselves from a conflict of interest in that we assigned or retained separate counsel to represent us in the Penn Central proceeding, Kelley, Drye, Newhall and Cornelius, and Simpson, Thacher and Bartlett in the New Haven proceedings.

Q You had been representing the New Haven. Why did you desert the New Haven and retain your trusteeships in other cases?

MR. BADER: Objection to the form of the question. It's argumentative, Your Honor.

THE COURT: When did you become a Trustee for issues of -- I take it these were all Penn Railroad?

THE WITNESS: That's right. No. New York Central.

THE COURT: You had New York Central too?

THE WITNESS: That's right. It was the New York Central System.

MR. BLACK: They're only New York Central.

THE COURT: Only New York Central?

THE WITNESS: No Penn.

THE COURT: No Penn?

THE WITNESS: That's right.

THE COURT: On what date did it become indenture trustee?

THE WITNESS: I think we have to go back a little bit. Manufacturers Trust Company became indenture trustee of the New Haven Railroad in 1947. The Hanover Bank was trustee of the New York Central bonds beginning the late 19th century. In 1961 there was a merger between the Hanover Bank and the Manufacturers Trust Company resulting in the formation of Manufacturers Hanover Trust Company, and at that point the New Haven was in reorganization. However, the Penn Central or the New York Central at that time was an ongoing relationship, and there was no possibility of a conflict at that point.

BY PROFESSOR MOORE:

Q You used the word "potential" a short time ago, but assuming, [illegible] you, that the conflict of interest was truly potential and rather doubtful at

that time, was there any doubt in your mind that there was a conflict of interest when Penn Central went into reorganization?

A Well, I think there was a possibility of a conflict. Again, as I say, we were represented by separate counsel.

Q You weren't a separate indenture trustee though?

A Sir?

Q You weren't a separate indenture trustee though, were you?

A Well, it was one organization trustee under both indentures, that's right.

THE COURT: How do you work that and not let your right hand know what your left hand is doing? Do you often do that?

THE WITNESS: Well, this was not a situation where we voluntarily entered into this situation. The Penn Central was not considered a candidate by us as a reorganization prospect. I think it was a shock to most of the financial community and as soon as it did file for reorganization, we did the best we could to insulate any possibility of a conflict by having separate representation and attempting

to resign the most easily resignable.

BY PROFESSOR MOORE:

Q Which mortgage did you seek to resign from?

A Well, at this point we decided it would be in the best interest of all concerned to resign from the New Haven mortgage since at that point most of the litigation of the New Haven mortgage had been concluded, and it was a question of working out the settlement, and we thought it would be easy --

Q What do you mean "most of the litigation had been concluded"? Don't you know that litigation has gone on ever since with the Penn Central over so-called equitable lien?

A Yes, sir. But our act of participation had pretty well ceased at that point.

THE COURT: Well, when that situation arose, I'm quite certain my memory is clear that one morning we had a hearing on the matter and you appeared in two guises, for and against the proposition on the same day and filed separate briefs, one for the proposal and one against it.

THE WITNESS: That's right. Each counsel filed those briefs. Right.

BY PROFESSOR MOORE:

Q Are there two Manufacturers Hanover Trust

Company?

A No, sir.

PROFESSOR MOORE: No further examination.

THE COURT: Can you tell me on your expense account approximately how much you allocate to bookkeeping matters, that is, keeping track of the transactions, finances, what you call generally bookkeeping?

THE WITNESS: Bookkeeping work. Of the amount that we seek, very little of that is involved in that because we were paid by the trustee for most of that work on an ongoing basis. This is an extraordinary charge.

THE COURT: But you don't know offhand what the percentage is?

THE WITNESS: No, sir.

REDIRECT EXAMINATION

BY MR. BADER:

Q What is the amount that was charged for regular service?

A About $44,000.

Q Over the ten years?

A Which we had been paid on an ongoing basis.

THE COURT: That was an annual payment,

$44,000?

THE WITNESS: That's right. Based on a bid we had made in 1947.

BY MR. BADER:

Q So the Court is clear, what was the annual amount? Was it 44,000 or 4400, the annual amount that was paid for those routine services?

A It was about $4,000 a year.

Q Let me take your mind back to June of 1970, if I may, Mr. Byrne. I think you testified on Professor Moore's examination that it was on June 20th, and I believe actually it was June 25th that Penn Central went bankrupt?

A Yes, sir.

Q Do you remember when the decision of the Supreme Court on the New Haven inclusion case came down?

A I can't remember. I'm sorry.

Q May I suggest it was about a week later? Does that refresh your recollection?

A Yes. That's right.

Q Now, if you recall, the briefs and the statements of position to which His Honor referred, do you recall in what connection those were submitted?

A The resignation?

Q No. His Honor pointed to the fact

Kelley, Drye filed a brief and Simpson, Thacher filed a brief, and we all appeared, that is to say, Kelley, Drye and Simpson, Thacher appeared and argued against one another. Do you remember in what connection it was that those briefs were filed and that argument was made?

A I'm drawing a blank.

Q Do you recall if there came a time in 1970 when the court issued an order requiring the parties to submit their views on, I believe it was, six questions having to do with the form of the remand order of the court to the Inter-State Commerce Commission, the court having jurisdiction on remand from the Supreme Court of the United States?

A Yes.

Q Do you recall the date approximately when the court made that instruction to the parties to brief him on that point, namely, those six questions?

A (No response)

MR. BADER: Your Honor, if I may, that is a matter of record. It's August 10, 1970.

THE WITNESS: That's right.

BY MR. BADER:

Q Let me ask you a question. Prior to August 10, 1970, had any discussions taken place within

Manufacturers Hanover Trust Company as to whether or not Manufacturers Hanover should resign because there was a potential conflict of interest?

A Yes. There was.

Q Do you recall what directive was issued by the Chairman of the Board of Manufacturers Hanover Trust?

A The Chairman directed that it resign immediately.

Q From what mortgages?

A All mortgages.

Q That is to say, all the Penn Central mortgages and the New Haven mortgage; is that correct?

A Yes. That's correct.

THE COURT: And when did he do that?

THE WITNESS: Just shortly after the Penn Central went into reorganization in 1970.

MR. BADER: In the month of July, Your Honor, Mr. McAfee was present at the meeting and I can testify on that point if you wish.

THE COURT: Yes. Well, he can go ahead and testify as far as that goes.

THE WITNESS: It would be in July, 1970.

THE COURT: That was to resign from all their positions as indenture trustee for the

old New York Central bonds and from the New Haven?

THE WITNESS: (Witness nods head.)

THE COURT: What happened after that?

THE WITNESS: Well, it was impractical. As a practical matter, we couldn't do it. We felt we couldn't resign, leave the Bondholders without any trustee, first of all, and then we proceeded to canvass banks throughout the country to take over this business, and we were unsuccessful.

BY MR. BADER:

Q Was Manufacturers advised by its counsel, that is to say, Simpson, Thacher and Bartlett on the one hand and Kelley, Drye on the other hand as to whether or not they could resign, simply resign the Trusteeship in the summer of 1970?

A We were advised that we could not just flat out resign.

Q Do you recall what the reason given for that was?

A Well, the Bondholders had to have a Trustee.

Q When did the search for replacement Trustee under the various indentures commence, sir?

A It commenced immediately, the summer of 1970, and had been continued.

Q Do you recall how many banks approximately

were contacted in an effort to find a successor?

A Oh, over 62.

Q Are you aware of any banks that had a Corporate Trust Department that didn't have a conflict of interest already that were left out of your canvass?

A We canvassed everyone that we knew that had a Corporate Trust Department that could handle the matter and we were unsuccessful.

Q Was an effort made in 1970 by Kelley, Drye on behalf of Manufacturers Hanover Trust Company to request permission of the Pennsylvania Court and the Trustees of the Penn Central to withdraw as Trustee under the Penn Central mortgages?

A Not at that point. No.

Q Don't you recall letters being sent, sir, by Mr. Heiss?

A Oh, that's right. Yes. I'm sorry. But the result was that because of the newness of the Penn Central reorganization and the situation in Philadelphia that we were advised not to pursue it.

Q Weren't you, in fact, told that the Pennsylvania Court and the Pennsylvania Trustees' counsel, namely, Mr. Blanchette, would oppose an application to resign because that would have involved substituting seventeen new Trustees and seventeen new counsel?

A Yes, sir.

Q I have one further question, --

THE COURT: What is your position now with respect to these bond issues of which they were formerly New York Central and of which you were indenture trustee?

THE WITNESS: We have resigned from the Gold Bond Mortgage.

THE COURT: I know that, but what about the rest of them?

THE WITNESS: Well, we have been still attempting to resign from those, and we have not been successful.

THE COURT: What position has been taken throughout with regard to the New Haven position as to what is the security of its claim that is, the equitable lien and so forth. What position has been taken by Manufacturers Hanover? Do they now concede that the New Haven's claim is secured by an equitable lien or are they still contesting it?

THE WITNESS: I think that was litigated and decided on appeal, wasn't it?

BY MR. BADER:

Q Do you know what position is being taken by

Manufacturers Hanover as Trustee of the Penn Central as to whether or not the New Haven Railroad Corporation has a lien upon the assets of the Penn Central that were formerly New Haven assets? Do you know?

A No. I don't know. I would have to ask counsel.

THE COURT: Which counsel?

THE WITNESS: Kelley, Drye.

THE COURT: They're not here, are they?

THE WITNESS: No. They're not, sir.

THE COURT: Is there any officer of the bank who knows what they were doing, what position has been taken?

THE WITNESS: Well, I assume that it's consistent with the position that was taken on appeal.

BY MR. BADER:

Q Do you know whether there has been any litigation? Are you aware of any litigation in which the Trustees of the Penn Central, that is to say, Manufacturers as Trustee of the Penn Central has taken a position since the appeal, since Judge Anderson's order of 1971?

A I'm not.

MR. BADER: I have no further questions.

THE COURT: Well, I wonder if you could find out about that.

MR. BADER: Your Honor, until this moment I was not aware that the indenture trustees in the Penn Central had been active in that litigation since the litigation that immediately followed our resignation, that is, the appeal to the Second Circuit.

THE COURT: Well, they're still indenture trustees for old New York Central bonds, I take it.

MR. BADER: And I have no doubt, sir, in their capacity as indenture trustees, if the issue arose, Kelley, Drye would take the position that New Haven is not a secured creditor of the Penn Central as to these stock, but I don't know that the issue has arisen.

THE COURT: All right.

RECROSS EXAMINATION

BY PROFESSOR MOORE:

Q Mr. Byrne, were you advised whether or not you could petition Judge Anderson and Judge Fullam to have special counsel or special trustee appointed?

MR. BADER: Could I hear the question?

(The previous question was read back by the Reporter.)

MR. BADER: Could we fix this as to time?

PROFESSOR MOORE: Any time.

MR. BADER: Well, I think the only real issue is between July 1 and August 10, and I don't think it would have been feasible then -- I think it's pertinent what time we are talking about.

THE COURT: Well, I think it's a proper question as far as any time after the Penn Central went into bankruptcy. From then to the present. At any time there was no petition to me that I recollect with regard to them.

THE WITNESS: No, sir.

THE COURT: And, of course, I would have no authority over them because they're all New York Central bonds, and I take it that would come before Judge Fullam in the Eastern District of Pennsylvania.

THE WITNESS: And I answer your question no.

THE COURT: Was a petition made to him relative to the appointment of substitute trustee --

THE WITNESS: No, sir.

THE COURT: -- special master or anything of that sort to fill in where you felt you should resign or at least your Chairman of the Board should decide?

THE WITNESS: No special, no.

THE COURT: Was anything done outside of the contacting the 62 banks with a view to asking them to step in as indenture trustee? Was anything else done?

THE WITNESS: No. There wasn't.

THE COURT: You didn't take the issue up with the Court at all?

THE WITNESS: No.

THE COURT: When you found they wouldn't take it, you couldn't find any bank to take it, you just kept on going? I mean the Manufacturers are still acting as indenture trustee --

THE WITNESS: Yes.

THE COURT: -- for those bonds?

THE WITNESS: Yes.

MR. BADER: May I ask the witness one more question?

THE COURT: Yes. Go ahead.

BY MR. BADER:

Q Is it Manufacturers' view that having resigned the New Haven indenture there is now a conflict of interest in which Manufacturers Hanover is involved?

A No.

MR. BADER: Thank you.

THE COURT: That is a rather profound question.

MR. ZELDES: May I inquire, if Your Honor please? For the record, my name is Jacob D. Zeldes, a successor indenture trustee.

CROSS EXAMINATION

BY MR. ZELDES:

Q Mr. Byrne, there was one question Judge Anderson asked you and I wasn't sure whether or not you answered it. He said "Do you often do that with respect to hiring separate counsel to take conflicting positions in matters?" Can you answer that?

A Well, to the extent that we don't ordinarily have a situation like this, I would have to say no because we don't often have a conflicting situation. This was an involuntary situation.

Q As I understand it, the bank as a trustee came to the conclusion that they could insulate the

problem by hiring two separate counsel; is that correct?

A Yes.

Q And did you receive the permission or the consent of either this Court or the Reorganization Court in Pennsylvania to approve that insulation theory that you adopted?

A No. We did not.

Q Now, can you tell me, please, who the officials were in the bank who dealt with the lawyers in the various states? Were there many people involved?

A Many people, yes, sir.

Q And were those the people that also dealt with Kelley, Drye, Newhall and Cornelius, the firm that you hired in connection with the Penn Central?

A Yes, sir.

Q Now, can you tell us when you first retained Kelley, Drye to advise the Manufacturers Trust in this matter?

A Kelley, Drye represented the Corporate Trust Department beginning in 1961 at the time of the merger. It had previously represented the Hanover Bank. Simpson, Thacher and Bartlett had represented Manufacturers Trust Company and since the Railroad was in reorganization at the time of the merger, we continued and retained Simpson, Thacher to represent us -- to continue

representing us in the New Haven matter.

Q I noticed in your Petition to withdraw in this case as trustee in 1971 you quoted the indenture instrument as saying that the successor should be a Corporate Trustee, if possible. Did you take any steps to secure the services of any individual with respect to the Penn Central situation to replace you?

A We have not. No, sir.

Q As a matter of fact, in connection with this estate, the New Haven estate, did you take any steps with respect to securing the services of an individual successor indenture trustee or was that done by the court to your knowledge?

A With the court's help we obtained a successor.

Q Did the initiation come from the court or the bank with respect to finding an individual?

MR. BADER: I think that may be a dual question.

THE WITNESS: Initially, we approached the court.

BY MR. FIELDS:

Q My question was -- I'm sorry. Perhaps I didn't make it clear. Excuse me, Mr. Byrne.

Prior to approaching the court, did the bank seek out any individuals with respect to replacing

you in the New Haven estate?

A No.

Q Now, you mentioned that you received, I believe you said on direct examination, the advice of counsel concerning the insulation theory. Was this advice given to you by your attorneys in this proceeding or in the Penn Central proceeding or in both proceedings?

MR. BADER: I don't believe that was the witness' testimony. The witness' testimony was that he was advised from his counsel they could not withdraw from the trust at that time.

THE COURT: Was there a general discussion with your counsel, that is, Mr. McAfee and his firm with respect to representation by Kelley, Drye on the issue that was coming up on the --

THE WITNESS: Well, you see, at that time we were represented by Kelley, Drye in the Central mortgages, and we were represented by Simpson, Thacher on the New Haven, and it was a continuing situation.

THE COURT: Kelley, Drye came up to the New Haven hearing?

THE WITNESS: Right.

THE COURT: Now, was that taken up

with Simpson, Thacher's firm before they came? I mean my understanding has been that they were as astonished as others.

THE WITNESS: I personally don't recall any other conversation to that effect.

THE COURT: There certainly was no round robin on this thing between the counsel under the egis of the Manufacturers Hanover Trust Company.

THE WITNESS: No, sir.

THE COURT: As far as you know, you treated them as entirely separate counsel for entirely separate purposes?

THE WITNESS: Yes, sir.

THE COURT: And it was your thought in so doing that you insulated yourself from any disqualification in so doing?

THE WITNESS: Yes, sir.

BY MR. ZELDES:

Q One of the points you mentioned on direct to Mr. Bader was that you in setting the fee as you did as trustee, you were concerned with the novelty of the issues involved. I assume, therefore, when you came upon this insulation theory, you consulted counsel on this theory; is that correct?

A Yes.

THE COURT: Which counsel?

THE WITNESS: Well, we have talked to each counsel separately.

BY MR. ZELDES:

Q And did they both -- I'm sorry, Your Honor.

THE COURT: Go ahead.

Q When you consulted with both of these counsel separately, did they give you the same advice with respect to the insulation theory?

A It's the best we could do, yes.

Q But they both gave you the same advice; is that correct?

A Yes.

Q Were any of these advices given to you in writing?

A I would say no. To my knowledge, no.

Q Now, in connection with the present situation affecting the reorganization, is it fair to say that at this time your bank is taking a position hostile to Mr. Smith's position in attempting to secure the New Haven estate with respect to the assets of the Penn Central?

A I am not aware of our taking a position at this point. We have taken our position.

Q Well, have you abandoned that position?

A No. We have not abandoned that position.

Q And you are still maintaining that position as far as any dispute between the two estates?

A As far as I am aware, yes.

Q Now, in the papers submitted there is some reference to your arrangement with your lawyers in this proceeding as to their compensation. Is there a written document with respect to that?

MR. BADER: No, Your Honor.

THE WITNESS: No. I don't believe so.

THE COURT: As I understand it, you paid them what, $91,000 which may be recoverable if payments are made to cover attorney's fees.

THE WITNESS: Yes, sir. We advanced it.

THE COURT: You understand that?

THE WITNESS: Yes.

THE COURT: You understand it that way?

THE WITNESS: Yes, sir.

THE COURT: Am I mis-stating the evidence, Mr. Bader?

MR. BADER: It may be irrecoverable?

THE COURT: No. I didn't say irrecoverable. I said would be recoverable by

the Manufacturers from counsel.

MR. BADER: Yes, Your Honor. I would add one thing. We do have a moral right to look to the bank to look to recovery. We don't have any legal right.

BY MR. ZELDES:

Q With respect to what Mr. Bader just said, is it your understanding if for some reason the Court doesn't compensate your lawyers in this proceeding the bank will have to make that payment?

MR. BADER: I think in view of the point I made, Your Honor, it is an ambiguous question.

BY MR. ZELDES:

Q Let me ask you this then. What is the bank's understanding with respect to compensation for your lawyers in this proceeding in the event that the Court should not award any out of the estate?

A Well, I think we would then discuss it.

Q Pardon?

A I think then we would discuss it. We have not reached an agreement or an understanding on that point. I think this would be --

Q Do you agree with the statement that your lawyer just made that you are under a moral obligation

to pay them if that occurs?

A I think we would.

THE COURT: You would what, have the obligation or would pay them?

THE WITNESS: We would pay then.

MR. ZELDES: May I just have a moment, Your Honor?

THE COURT: Certainly.

BY MR. ZELDES:

Q In the opening part of your direct testimony, Mr. Byrne, you mentioned that you considered that because of your primary position on the mortgage that you, the Bank collectively, had the primary obligation in this estate to secure the assets and to obtain a beneficial result for this estate; is that your position?

A Yes, sir.

Q And would you think that that position was more of an obligation than on the junion lien holders in the case?

A I think so.

MR. ZELDES: I have no further questions, if Your Honor please.

THE COURT: Very well. Anybody else?

MR. BADER: May I ask one question,

Your Honor?

THE COURT: Certainly.

REDIRECT EXAMINATION

BY MR. BADER:

Q You were asked if you had received the approval of the Court, both Courts before when you represented Manufacturers through Kelley, Drye and Simpson, Thacher taking another? Is it a fact, Mr. Byrne, the existence of that conflict was disclosed to both Courts?

A It was.

Q Do you know of any objection having been interposed at the time of the filing of those papers by any party?

A No, sir.

MR. BADER: Thank you.

THE COURT: Anybody else? I guess you may step down.

THE WITNESS: Thank you.

THE COURT: Anyone else wish to be heard?

MR. BADER: I think that concludes the evidentiary side of the hearing, Your Honor. I don't know whether there is --

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THE COURT: Anyone else have any evidence to offer?

MR. BROADLEY: Your Honor, I am John Broadley from the Department of Justice. I'm sorry we were late, but we were in court in New York this morning. I don't have any evidence, but the reason we came up here was to bring to the Court's attention the fact that the Secretary of Transportation has determined to seek a mandatory legislation to the --

THE COURT: Who is seeking this?

MR. BROADLEY: The Secretary of Transportation.

THE COURT: Oh, I see.

MR. BROADLEY: To return the jurisdiction over the compensation matters to the Inter-State Commerce Commission. We have a Motion For Leave to file Memorandum on amount of time and a Memorandum which sets forth the text of the Secretary's proposed legislation. It is hoped that the Amendment can be added onto an Amtrak Improvement Bill which has already been reported out by both the Senate Committee and the House Inter-State and Foreign Commerce Committee. It is expected that the resolution of the Amtrak

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matter will occur within the next four to five weeks and, hopefully, the resolution of the Secretary's proposed amendment would occur within that time.

We thought it proper to bring to the Court's attention and also to the attention of the parties in this proceeding the fact that a possible change in the jurisdictional framework for this type of determination could occur within the near future, and if Your Honor would like, I could give Your Honor a copy of the Memorandum immediately. We haven't yet filed it with the Clerk.

THE COURT: Very well.

MR. BROADLEY: (Hands document)

MR. BADER: Your Honor, I will object to the receipt of this material both on the grounds that it is out of time and also on the ground that it is irrelevant and immaterial.

MR. POLLACK: I will join in that objection, Your Honor.

MR. STANTON: So will we, Your Honor, with the submission that the Court must decide the Petitions under the present law, not on the forecast as to the future course of statutory proceedings.

THE COURT: Well, of course, there is no such law passed at the present time. As I understand you, a committee of what, both the House and Senate?

MR. BROADLEY: Committees have reported out the Amtrak amendatory legislation.

THE COURT: But I mean does it contain a provision that jurisdiction over compensation matters should be passed upon by the I.C.C.?

MR. BROADLEY: No. It doesn't, Your Honor. They are seeking a floor amendment in the Senate.

THE COURT: Well, as it stands now, of course, the law is the way it was when the December Act was passed or whatever the date of the Act is.

MR. BROADLEY: Yes, Your Honor.

THE COURT: So, actually, there is no change in the law.

MR. BROADLEY: There is no change in the law, but we thought we ought to bring to your attention the possibility.

THE COURT: They are making an effort to have a change?

MR. BROADLEY: Yes, Your Honor.

THE COURT: Maybe some others are trying to change it some other way.

PROFESSOR MOORE: At the last proceeding we had it was my understanding the Inter-State Commerce Commission had acceded completely to your jurisdiction, making no objection.

THE COURT: They so stated.

MR. KAPLAN: May I be heard on that point, Your Honor?

THE COURT: Yes. Who are you?

MR. KAPLAN: My name is Kenneth Kaplan. I represent the Inter-State Commerce Commission. We were advised by the Department of Transportation yesterday that they would make this presentation here this morning.

The Commission itself has not had the opportunity to be informed of the proposed legislation, has not seen it, and has not commented in any way at the present time. However, we would ask the Court along with the Department of Transportation and the Department of Justice to stay its action here on these petitions until such time as the Congress does have an opportunity

to act on this legislation and, in effect, keep it status quo until such time as legislation is acted on either for or against.

THE COURT: I take it this is only being sought by the Inter-State Commerce Commission?

MR. KAPLAN: No, sir. This is not being sponsored by the Inter-State Commerce Commission. We are just an interested party.

MR. BADER: May I inquire as to who authorized the Inter-State Commerce counsel to seek a stay here without papers?

MR. KAPLAN: My only purpose here this morning is to keep it status quo until such time as Congress does act.

THE COURT: Of course, there are all sorts of bills Congress is pulling and holding with an infinite number of conflicting interests in this railroad field. It's about as mixed as it could possibly be and it doesn't seem to me that it is necessarily going to come to rest in three or four weeks. After all, these people have waited a long time, and I really see no justification for attempting to stay the proceedings of the Court. You can't tell when it would ever come to rest and by the time that time is almost

up, I suppose other propositions come in and if the Court is going to have to continue to hop, skip and jump according to proposed legislation, why, we would be in the position of a twirling dervish most of the time. I will deny the stay.

MR. KAPLAN: Thank you, Your Honor.

THE COURT: Anybody else have anything on which they wish to be heard?

(No response.)

THE COURT: Well, I think if the Court has nothing further and no one has anything, would you like to be heard, Mr. Migdal?

MR. MIGDAL: Your Honor, I thought that we were going to have a chance to make some closing appeal on the basis of the briefs that had been submitted, and I would like to say something with respect to the legal points in the matter.

THE COURT: Very well. Go right ahead.

MR. MIGDAL: If it is permissible at this time?

THE COURT: Certainly.

MR. MIGDAL: There has been an enormous amount of labor in this case, and I feel that the benefits to the estate have been plainly

so great --

THE COURT: Of course, I haven't got much money yet, Mr. Migdal.

MR. MIGDAL: I believe that that is not the simple way or the proper way to look at it.

THE COURT: Well, I realize argument has been made and there is much in it and, of course, this Circuit has gone quite a way to hold that as far as attorneys, the expenses of the Trustee for attorney services follow somewhat a different approach. On the other hand, it is one factor that I think all courts have recognized may be considered.

MR. MIGDAL: I think that is a factor that may be considered, Your Honor. I surely believe the question of benefit to the estate is a factor that the Court may consider.

It must be recognized in this case that one of the benefits has to do with the ability of the trustee in this case to argue that the claim of the New Haven is indeed in the Penn Central reorganization a secured claim. Part of the expense that the Trustee points to in his continuing operations has to do with his need to press that point. The point that would not be

available except with respect to the limited number of bonds issued, the 23 million face value of bonds issued would not be available to the Trustee in this case. Your Honor has already ruled once that there was an equitable lien for the balance, and I believe that the possibility that Your Honor had occasion to rule on that question in the first instance was because of work that these petitioners or some of them did.

There is today an equitable lien indeterminate in amount and duration that was found by Judge Fullam in the Second Circuit when it was held that Your Honor should not have issued the equitable lien on the ground that the more appropriate jurisdiction was in Judge Fullam's court. It made no comment there and it specifically pointed out that it was not saying that the equitable lien was not appropriate.

I think that if you review some of the things that these petitioners did that at any time at all relate to the question of the improvement of the nature of the form of the security, what was accomplished, for example, in respect of the receipt of the income from the Grand Central Terminal property, the assistance

that was given to the estate in respect of the contribution to the losses. You had a very substantial fund of dollars which has already been received. What bothers me is the devaluation as I feel of our contribution. The Trustee finds that to be in the range of 30 millions of dollars, and we have argued in our brief that it should be a good deal more. But that there was a substantial benefit no one argues.

It seems to me that once it is conceded as it is in these papers that there was a substantial benefit to the estate, at that point the teaching of Kinell (sic) is that you should start with the time the attorneys devoted to the proceeding and that they should be paid in the first instance in accordance with a large number of factors, but the time charge is the principal factor, and the way the petitioners stand before this Court, all of the petitioners have sought their time in the first instance. Two of the petitioners, Simpson, Thacher and ourselves have suggested that when you consider all the other factors in the case an appropriate premium should be paid.

In our own situation, for example, we

have waited many, many years for payment. We have been obliged to advance great expenses, $47,000 of expenses, necessary expenses in connection with the printing of briefs, travel, and so forth.

Under those circumstances, the contingency factor is a proper consideration, and we have called the Court's attention to the cases on that score. What I would hope is that the Court will not permit, as I feel happens in the Trustee's statement, will not permit a confusion between the cash stringency of an estate and the amount of the award to be confused. The amount of the award, it seems to me, is one thing, and the time in which it is paid, the period over which it is paid, the amounts in which it is paid from time to time, that represents a separate question. Handled in that way it would make it possible not to use the uncertainties of this moment, the desire on the part of the Trustee to know finally exactly what the estate owes for these services, to permit the working of a great injustice for if, indeed, these expenditures which the Trustee contemplates over a long period of time for the purpose of affecting the security claim of the New Haven come to pass, then what

you will have is an estate which ought to be able to meet 100 cents on the dollar of the First Mortgage Bondholders' claim, and that seems to me also has to do with the special right to some premium.

Simpson, Thacher and we represent the First Mortgage Bondholders' loan and, therefore, whatever is paid from that fund on the assumption that there will surely be enough to take care now of the administration claims, all of that payment will be made by the clients we served.

The only question then is what is a fair payment? In that connection I would ask the Court to recall that it was in the nature of the agreement signed by the Trustees of the New Haven and Penn Central that they were not to question the fairness of the terms of that agreement. Therefore, we had to act -- counsel had to act if the estate was to be protected because the Trustee could not act. This is not a criticism of the Trustee. We concede that there was a foundation from which we operated, but we were there as special counsel to the estate nevertheless working on a contingency arrangement, nevertheless waiting for years to be paid, nevertheless

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advancing our own disbursements.

Under those circumstances, the time starts out as the minimum to which we are entitled in the same way as any special counsel employed by the Trustee. There is a difference. That special counsel acting for the estate was paid regularly as his time accrued. Sometimes he had to wait as much as a year, but in any event, there was no question in anyone's mind the special counsel was to be paid, and I say that in the circumstances of this case, we were that special counsel with respect to the fairness of the terms of the agreement.

I am hopeful that the Court will promptly decide this matter, and I am very upset by the applications made on behalf of the United States and the Commission. I think the Commission's presence in this instance is especially unfortunate since the Commission had written to us saying that they were not going to be present at this point. They were going to take no position at this hearing. This represents change in position without any announcement to us in advance that they were going to make such a change.

There is one other small point that I

feel I must call to the Court's attention. There is in the Trustee's statement a footnote to one small portion of the list of hours spent by attorneys at Migdal, Tenney, Glass and Pollack. That concerns the note that there was a law clerk who spent a certain number of hours working on this case. I have not understood the significance of the footnote, but I should like simply to say the following about it. That man would normally have been lumped with the associates in the ordinary petition. He was an Assistant Professor of Economics at the Columbia Business School, and he had graduated and he was waiting to be admitted. At the time that we did the application, at the time we had done these forms we wanted in no way to have it later be asserted that he had perhaps seemed to be charging for time as an attorney when he was not yet an attorney. The whole amount of that charge is something around $5100.

THE COURT: What did he get an hour?

MR. MIGDAL: I think we charged $35 an hour. I think the whole amount at that time was $5000.

THE COURT: I just roughly computed that. This is what a Federal Judge is worth

according to the Executive Branch and the Legislative Branch of the United States Government. It runs about $18 an hour.

MR. MIGDAL: Your Honor, if I were to try to describe the overhead associated with that $35 an hour which is borne by the General Treasury or borne by us, you would see that there is no great profit in $35 an hour.

THE COURT: Well, don't be concerned about my reference to the state of the Judiciary because it has nothing to do with this.

MR. MIGDAL: I believe you are all underpaid.

MR. KAPLAN: Your Honor, may I respond to the comment that was made?

THE COURT: Well, I have already ruled on your motion. I don't think we need extraneous comments on the situation.

MR. STANTON: May I say a word, Your Honor, on behalf of the Trust Company?

THE COURT: Yes.

MR. STANTON: I will be very brief because of my awareness that it would be very presumptuous for me to be anything else when the Court knows so much more of the services that

were rendered on behalf of the Harlem River Division Bondholders in this proceeding than I do.

I would like to refer only then not to the full range of services set forth in the Petition, but to Your Honor's comment to Mr. Migdal that the estate has not yet received much money as a result of those services, and as pointed out in our reply brief as elsewhere, one of the significant services really memorable in the whole course of this proceeding it seems to me is the obtaining of the assumption by the Penn Central of the Harlem River Division bonds. That was accomplished by the Trust Company over the stubborn opposition of the Penn Central Trustees and with no support by the New Haven Trustee, and I would hasten to say that the reasons why the New Haven Trustee could render no support to us in that endeavor are understandable and respectable, but it left us serving substantially alone in that respect, and the result was to relieve the estate at once in 1968 of its whole obligation on those bonds including accumulated unpaid interest in an amount roughly a little over 8.8 million dollars.

Now, that we submit standing alone is not

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only a concrete and unarguable benefit, the assumption of that obligation of the estate by another entity on the estate's behalf, but in fact, since the New Haven Trustee would if the assumption hadn't occurred, would otherwise have received the 8.8 million dollars in the form of Penn Central securities. The magnitude of the benefit for the estate increased when the Penn Central went into reorganization, and I would trust that Your Honor will not overlook the scope of that form of money received by the estate.

THE COURT: That is quite a complicated concept. It reminds me of Professor Hofell's (sic) concept of a beneficial liability.

MR. STANTON: The reduction of the liability, Your Honor, is always a pleasure under Hofell in analysis or any other.

THE COURT: Thank you. Mr. Bader.

MR. BADER: Out of concern for my vocal cords, if not your ears, Your Honor, I will be brief.

Your Honor, the bearers of these petitions have done what they have done. It is now for you to decide what those services were worth, how they should be compensated. I don't

think there is any dispute here that the services have been valid or that there should, in fact, be reimbursement.

We have tried in our papers to assist you in the analysis of how compensation should be calculated. That is to say, our compensation. We don't presume to set the compensation of others.

We tried also to indicate to you how we measure the magnitude of the effort, how we measure the genuine magnitude of the victory. We have by no means meant to discount the problems of delivery of the victory, and I think we have proposed to Your Honor an analysis which supports the application. I have no intention, Your Honor, to get into any sort of comparison or contrast of worth. I think I have said this case has been one of the most thoroughly enjoyable for me in my professional career because it's involved a cooperative effort on all sides involving a number of very fine people, and I'm grateful for that experience. I think the estate benefited in an enormous way in the fact that we did work together so well.

I do think, Your Honor, that although the Trustee raises some reservations that there

is sufficient evidence in the record for Your Honor to make a final evaluation and a final determination, and I would urge Your Honor to do so.

I am almost tempted to say and I think I will say, Your Honor, in view of the ping-pong game that seems to be going on in Congress, I would urge you to do so in a hurry.

I would like to turn now, Your Honor, to a question which I did not prepare to argue here this morning, at least formally. That is the question of conflict of interest that has been raised here not for the first time. I, frankly, had hoped, Your Honor, that the proposal contained in our reply brief in the footnote at page 28 should have obviated that issue because it seems to me that the issue was limited in time, at least limited in time as to the services for which we sought reimbursement. I don't think there is any claim that it expands outside of the period June 21, 1970 through whenever it was we resigned, and the services, to be blunt, Your Honor, after the submission, the final submission of papers in about February of '71 were, essentially, clerical even on the part of counsel. All we were doing was preparing an application to resign. I find,

however, that in the interest of certainly my client, if no one else, it is incumbent on me to comment on it.

I would like to call your mind back, Your Honor, to the period of time we were talking about. The bankruptcy occurred on the 21st of June, 1970. It was a Sunday. I remember being at a meeting in Trustee Smith's office on the 29th of June when one of the attorneys from our Washington office called to read a Supreme Court decision. I must admit, Your Honor, and particularly in the conversation that followed my expectation, and I think perhaps Mr. Burton (sic) reflected it here, that there would be a hiatal period. There was conversation at that time indicating that the Commerce Commission was going to take this case, they probably were going to hold New Haven on remand until the Penn Central was sent to them. I would say in fairness to the bank that the bank was focusing on the new and very suddenness of the problem that it had. There was, as the testimony has indicated, a decision immediately that we had to get out, get out as soon as possible. There was also a recognition almost simultaneously that we simply couldn't walk away. To me, at least,

there were a number of surprises.

The first surprise was the indication we had that Your Honor was going to frame an order on remand. I had not contemplated that, and if Your Honor will recall, we were given six questions. They were vitally important questions and they had to be answered. We advised the bank of the position we were going to take. We were told to go ahead and make it as vigorously as we could. I don't think Manufacturers deserves any credit for that. Any Trustee of New Haven was going to take the position on the equitable lien we took, and similarly, any Trustee, any representative of the Penn Central interest was going to take the opposite position and plenty of them did, Your Honor. This was a question of law, and the bank had really no choice in the matter.

It has been suggested here that special Trustee could have been requested. I think it probably could have, but not in the time frame you are talking about here. We had to frame answers, and as I say, they were legal answers. To be blunt, Your Honor, I don't think that our services, in saying to you there should have been an equitable lien, were essential because those

same positions were asserted by the Trustee in reorganization who had the principal responsibility, and there was no longer the conflict or the differences of opinion that made it necessary for the bank to act against the reorganization Trustee, and there were other counsel representing New Haven interests.

Similarly, I don't know whether it was necessary for Penn Central Trustee, the Manufacturers Gold Bond Mortgage interest to have asserted a special position.

There was one thing, however, Your Honor, and it seemed to me that it almost compelled the situation that existed. There was one thing they knew about it that nobody else knew. That is to say, Kelley, Drye. That was the Gold Bond. There was one thing we knew about it and probably nobody else had known because we had taken it as one of the strings in our band, and that was the Biltmore issue in the Grand Central Terminal property. That was one thing we had something to offer on that perhaps in a degree that no one else did, and the Gold Bond rights was one thing Kelley, Drye had something to offer on that perhaps nobody else could offer.

I think under the circumstances, Your Honor, I have used before the analogy where you find the drunk in the street and you have got to at least make sure he gets to the sidewalk, but I think we were faced with the necessity of acting. We recognized the dangers involved in acting, and we also recognized, and I think this is the compelling thing, the grave dangers in not acting, the failure of fiduciary responsibility in not representing these assets on both sides.

I have nothing really to add, Your Honor. I think we did the best we could. We did not invite this issue. It was thrust upon us. If we were wrong, I apologize.

THE COURT: Anybody else wish to be heard?

[illegible]: Your Honor, we want to stand basically on our statement of position. I want to call attention only to a few things and at the very beginning to emphasize what we have said in our statement of position that we do recognize that counsel for the petitioners have rendered a benefit to the estate that is now compensable, and I would hope that there would be no unneeded delay in the decision of this case.

At the same time, there are some troublesome points. I don't want to regurgitate the problems of the conflict of interest, but it is a troublesome point so far as Manufacturers is concerned. It could have been done a different way, I'm sure. Maybe it wasn't necessary, but the courts, had they been approached, could have appointed something in the nature of a guardian ad litem to take care of the interest that was being taken care of by Kelley, Drye.

But I am troubled by the fact that, putting it rather bluntly, Manufacturers ran out on the New Haven. Now, in no way do we question the loyalty of Simpson, Thacher and Bartlett. In no way do we question their wholehearted loyalty. We cast no aspersion on the conflict of interest. It is true, I believe, it's too bad, but there is a very serious problem of duplicating services. It's true many of them were cooperative, but in a sense if you were free to go out and hire one special counsel or two or three, you would hire no more than were needed to present the needed points of view.

Now, the counsel performed in this case notable services, the Trustees had laid the

basis, the floor from which they could go, and we are the first to say that counsel rendered notable services to the estate, but I think it's almost inevitable that there are duplicating services here and somehow or other the Court is going to have to try and apportion an aggregate award.

Now, I think Manufacturers' brief, for instance, makes a suggestion that on the problem of paying for this, the Trustee could go to long term investment as against short term. It seems to me that the short term investments have worked extremely well. Mr. Smith has made up as high as 12 percent, but it's a problem that has to be weighed, I think, by the Trustee under the Court's instruction. A long term investment could result in a loss to the estate rather than a gain in relation to the short term investment.

Now, I want to point out that the multiplier seems like a happy thought, and I just pick up the Manufacturers' brief as an example, page 19. I believe what you come out with on that multiplier there is that all persons, senior partners, junior partners and associates come out at a rate of around $125 an hour. Now, certainly,

there is in this inflation, dollars aren't worth what they used to be, but Your Honor may recall that you invited these gentlemen to file fee applications as far back as 1969 when a dollar was worth a good deal more than it is now.

And I would like to make one or two small comments on United States Trust. The Trustee laid the basis in the Purchase Agreement. Section 62 provided that if Penn Central exercised its option to assume the bond, that is, the Harlem River Bond, the amount of new bond to be issued to the debtor's trustees would be reduced pro tanto. Counsel is quite right in saying that that did not require Penn Central to assume those bonds, but the Trustees had laid the basis for the assumption.

I also point to a benefit of the estate wherein the Trustees retired -- that is, the United States Trust, indenture trustee under the Harlem Division Mortgage, retired $1,115,000 of bonds for approximately $678,000. Assuming that he could properly go into the open market and buy those bonds, he certainly did a service, but it was a service that was easily performed and perhaps much easier than the benefit would

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indicate.

But aside from some little criticism like that, I personally want to say that counsel throughout this long litigation have rendered great benefits and it has been a pleasure to work with them.

THE COURT: Thank you.

MR. ZELDES: May it please the Court, prior to giving my observations and position, if I may, I would like to read to the Court the position that Mr. Iannotti has taken in the matter. He was out of town today and Mr. Schloss was scheduled to come here and had an emergency and is now in the Emergency Room of Grace New Haven Hospital with a burn situation. So otherwise, he would have been here. Mr. Schloss called me this morning and asked me to read to you the position that "I, Mr. Iannotti, agree with the general principles in the Trustee's belief and feel that the Trustee and the Judge have first hand knowledge of the services rendered. The issue is one of reasonable compensation."

It is Mr. Iannotti's position that the Court has sufficient knowledge and information to make that decision.

If Your Honor please, with regard to my own position, it is somewhat different than that and probably falls into two different categories. One would be in the nature of just some observations or perhaps some suggestions that might be helpful to the Court, and I make this suggestion almost reluctantly because I'm not sure of all the papers that have been filed in this regard.

I believe that the petition, the master petition is for everyone except the United States Trust and Carter, Ledyard's were not served on us, and I have not received any reply briefs from anyone except the United States Trust and Carter, Ledyard. Some of the comments I make may be covered in those papers. We did send someone to court some time ago to review the petitions that were on file, but it seems to me these comments and observations really tie in a little bit with what Mr. Migdal said in some respects.

It seems to me it might be helpful for the Court to have a statement of the hourly rates that the applications are actually based on. That may be in the papers some place. In our examination we could not readily find those.

THE COURT: Did you have a reply on

Manufacturers Hanover?

MR. ZELDES: No, Your Honor. That was not served on us. Perhaps all of this is of no significance to Your Honor. We did not receive the Manufacturers Hanover or the Chase written positions since the Trustees' brief, and it seems to me -- perhaps this is also repetitive and it may be there, but it seems to me in addition to what they're charging in the application, their normal rates ought to be set forth for the years involved so that Your Honor has that information available, and it seems to me also, if Your Honor please, two comments made by Mr. Migdal bear some comment.

The notion of whether or not there should be a premium paid in excess of the fair hourly rate for the compensation. I would suggest that a premium is appropriate, Your Honor, when there is a contingency aspect to the matter, and before Your Honor could resolve that it might be helpful to know what the relationship with the lawyers and the banks involved as to whether or not they were to receive compensation in the event there was not compensation awarded by the Court. If there is such a situation, as the testimony

disclosed today in the case of one of the banks, then, of course, that limits or reduces the risk factor, and one of the main points in allowing a premium I should imagine by the Court is to make certain that the compensation is sufficient so as to induce competent counsel to undertake the representation of the client in the matter. That factor should be relevant I would imagine in that regard.

Mr. Migdal did say one other thing that I think I should comment on. As I understood it, he said that the client who he served will pay the entire amount of the claimed fee. I think there is some question in that regard depending on the amount of the ultimate recovery in the case and, for example, if roughly speaking Mr. Iannotti's bonds have a value of, say, $75 million plus interest of $25 million, in the area of $100 million, and perhaps the full $134 million is recovered from the Penn Central, then it very well may be that the income mortgage bondholders are paying and those are the people to whom I have an objection.

On a more specific point, if Your Honor please, and again, somewhat reluctantly, I take the position that there should not be any

compensation to the Manufacturers Trust or their counsel in this matter, and I rely primarily on Professor Shore's analysis of the Woods case which is set out in his brief at page 26 and 27. At page 25 Professor Shore discusses what he refers to in the brief as the liberalizing impact of the Woods case and it is the Prudential Bond Corporation case at page 26, and those line of cases are lower court decisions. The Woods case is a Supreme Court of the United States case and those lower court cases which advance the liberalizing point. The Trustee's brief says at page 28, "Since the asset was paid from the bond series which was fully compensated in the reorganization, the Court considered that the attorneys' allowance should only be reduced, not denied completely."

In this situation, if Your Honor please, here again, we are not sure upon whom the ultimate burden will fall. But in the event that there is a substantial recovery in excess of the first bond which Manufacturers Trust has an obligation to represent, then it very well could be that the real burden of the Manufacturers is being paid by the second bond, the people whom I represent in these proceedings. It is with extreme reluctance

that I suggest that Simpson, Thacher shouldn't receive any compensation.

I don't quarrel with Professor Moore's observations about their approach to this proceeding at all, and as you know, we weren't involved in there and we don't in any way come into the situation in those earlier periods, but in view of the testimony today, it seems to me that the Court has a certain equitable function to perform in setting these fees, and in view of the fact that the Manufacturers will pay Simpson, Thacher, that it would be inappropriate to pay it out of the estate when there is the possibility that it will be coming from the income mortgage people's pocket.

I think that the Woods case stands for the proposition that there should be no compensation at all and not just the limited period that Mr. Bader mentioned. Therefore, so that the record is clear in that respect, he observed to you that no one was questioning anything other than that limited period. It is my position as the successor Trustee that I am questioning the entire fee for both the Manufacturers Trust and Simpson, Thacher and object to it on behalf of

my client.

If Your Honor please, one reason why I think it is perhaps appropriate to take this position is the testimony did disclose that both the lawyer for Manufacturers in this estate and the lawyers in the Penn Central Estate had some participation in what has been referred to as the insulation approach to handling the conflict, and I think in view of that that it is more appropriate to have Simpson, Thacher receive the compensation that is fair except simply receive it from Manufacturers rather than from this estate.

From time to time, if Your Honor please, we receive letters from bondholders saying "How much are my bonds worth?", and it is a very difficult question to answer as you can imagine. But one thing I think does have some importance, and it is the manner in which these letters come in. Sometimes they might be in handwriting and in a script that would indicate to me that they are very elderly people who are probably relying on these to some extent as a retirement cushion. So when Your Honor is weighing the fact that the petitioners are seeking compensation, in view of the conflicting situation and in view of the

evidence that was presented today which in some respects was, I think, somewhat startling, I think it is more appropriate to exercise your equitable powers and have the Manufacturers' lawyers in this proceeding look solely to Manufacturers for their compensation.

With respect to the matters concerning the benefit of the estate, Your Honor, I take no position and rely on Professor Moore's comments since he was familiar with these proceedings throughout, and for all those reasons, if Your Honor please, I respectfully request that you act in accordance with our request.

MR. MIGDAL: I am grateful to Professor Moore's statement for its recognition of the common efforts we all made even when we were opposed to one another to help this estate. It was a great pleasure for all of us to serve and to serve with one another. I want, therefore, only to comment briefly on the question of duplication. I would like to read just a few sentences from our brief because the question of duplication is a bothersome question. At page 16 we say:

"The suggestion of duplication in

the Trustee's statement is unfortunate. For any of the petitioners to analyze with particularity its contribution or to challenge the claimed contribution of others would be time consuming, self congratulatory and surely suspect."

And I believe that that was the situation in which we found ourselves when the question of duplication arose. I think that the duplication, and we say so in the brief, is postulated and not at all proved in this record. Many things that each of us did separately sometimes even where they on their face were unsuccessful are not charged in any respect to the benefit. For example, the Bondholders Committee sought to enjoin the Penn Central merger and we went all the way to the Supreme Court and the Commission in order to produce some equity on behalf of Penn Central rushed in with an inclusion report, served it on the Supreme Court, said "This is important for you to look at in connection with that application for an injunction."

What happened? It was at that hearing and before the Supreme Court that Mr. Cox of Covington and Burling said "Well, if you will

deny that injunction, we will take the New Haven in on any terms that are fair and reasonable to them." Dropping out of the question fairness on both sides, but leaving the only question left, fairness to the New Haven.

Now, you go along way down the road and that's not a qualifiable benefit. I can't believe in the context of this case it isn't recognized that it was a benefit to the estate.

There are other such examples. We divided the responsibility as far as possible. I don't agree with Bill either that it would have been appropriate in this case to appoint special counsel, one special counsel. Just take the situation of the nature of our opponents. Penn Central didn't rely on its staff counsel. They had Mr. Cousins, Mr. Gray, Ulrich Sweitzer and large staffs. Did they hire one special counsel? No. They had two, Plimpton and Covington and Burling. As it happened, we also had to oppose not only them, but the very learned fellows who were sitting at that table today. It was literally physically impossible for one firm to have done that, and we had different points of view. Nobody could abandon the position to anyone else and hope

that it would be carried out.

In this situation, for example, Mr. Zeldes would have been arguing that the shares had great value because they had to establish a benefit for the estate. It left it to the First Mortgage Bondholders to say those shares are not worth what you say they are worth. We are entitled to an underwriting. We carried the burden on that. I don't think that it's necessary to deal with this in that way. We had to oppose the position that the Harlem River bonds should come in at par without a discount for present value on that assumption. All these things, we had separate points of view. We had to watch one another. We had to watch the opposition. We had to watch the benefits of the estate. I really believe that there is no serious way in which substantial duplication can be found in our efforts, and I submit to you that as the record presently stands there is no such evidence.

Even now the Trustee's statement takes the position there is uncertainty as to what will be realized by the estate, and it was for that reason that back in 1969 when we were invited to apply, it seemed to us the wrong time to apply.

It was not then known exactly where the estate would be and we thought it appropriate to wait. But now a lot of us have gone, memories are weak. It's time after all this period that it be decided and that we not be charged with some error in having failed to apply earlier out of considerations of certainty for the estate.

THE COURT: Thank you. Anything further? Mr. Bader, are you going to read to the Court?

MR. BADER: No, Your Honor. I am in the process of researching before the Court. I may read you a slight provision, if I may, Your Honor.

THE COURT: All right.

MR. BADER: I will confine my argument to what I regard as the most significant menace to my client's position, and that is this question of actual or potential conflict. It is perhaps unfortunate that Mr. Zeldes did not receive my memorandum. Certainly, it is unfortunate, and I apologize. It's also unfortunate that I didn't receive a memorandum from Mr. Zeldes because then it might perhaps have been not so necessary for me to be trying to do legal and factual research

now.

I submit, Your Honor, that Mr. Zeldes has mis-stated and mis-read the Woods case. In that case there was, as Professor Moore's memorandum notes, an actual conflict of interest. There was a beneficiary involving self-dealing so that the person standing in the shoes that would be equivalent to Manufacturers Hanover was himself expected to benefit and the Supreme Court in spite of its prophylactic rule was careful to note and here, Your Honor, I am forced to quote the head quote, although I believe in the case of the Supreme Court reports they have somewhat more authority than usual, "Those expenditures normally should allow", which would have clearly benefited the estate, and I believe that statement appears of record. I believe that statement is an accurate characterization of the services rendered by Manufacturers Hanover Trust Company.

The problem, Your Honor, is that the benefit, if any, of what actions were carried out by Manufacturers Hanover Trust Company and by Simpson, Thacher were carried out on behalf of this estate. The estate will enjoy the fruits of those efforts, and that seems to me distinguishes

this case from Woods and also makes clear the inequitable character of Mr. Zeldes proposal that Manufacturers Hanover not having benefited from the services should nevertheless be asked to compensate.

Moreover, Your Honor, as far as I can make out in Woods, the self-dealing and the conflict went on throughout the proceeding. To apply such a rule here would be to say retrospectively, in effect, after all of the substantive work had been done that a forfeiture should be worked retroactively, and I don't think Woods stands for that, and I don't think the principles of equity stand for that.

Moreover, Your Honor, I understand that counsel did have an opportunity to review the Petition of Manufacturers for fees, and I would point your attention to paragraph 9 of Mr. McAfee's affidavit which sets forth the specific facts as I understand them of the estate, of the relationship between Manufacturers Hanover and Simpson, Thacher and Bartlett as to whether we were entitled to any reimbursement from Manufacturers Hanover. The commitment of Manufacturers Hanover is to listen to us. There is no commitment

on the part of Manufacturers to pay us.

I think, Your Honor, that completes my argument. Thank you.

MR. ZELDES: A brief response, if I may, Your Honor.

THE COURT: This is sur-rebuttal.

MR. ZELDES: I guess so. It will be brief though, if Your Honor please. On the point of receiving the memorandum, we did not file a Memorandum of Law and, therefore, everything that we have filed we have served. The point I was making before was neither the application or any briefs were served on us. I am not certain what exactly was filed, but I gather something fairly recently was filed that we have not yet seen. Insofar as any comments are inappropriate because of the material I haven't seen, I apologize to the Court.

I think perhaps a point ought to be made on Mr. Bader's comments. He urges that perhaps in the Woods case there was actual conflict. I realize that it is his position that there is no actual conflict, if Your Honor please, but it is that position which I cannot accept on behalf of our client in this proceeding. As we are in

this courtroom today, other lawyers retained by his client are either passively or actively attempting to prevent this estate from getting the greatest recovery that it possibly can. I think that rises to the level of the conflict, if Your Honor please, and I think that it has gone on for some period of time.

In respect to the exact relationship between the heirs and Simpson, Thacher, that affidavit was on file. As I say, we did not receive a copy of the affidavit that he referred to. We made some notes on it some time ago, and I don't have the exact wording, but insofar as there is a difference between the testimony in the courtroom today and that affidavit, I urge Your Honor to consider the testimony as it was elicited here in Court today on that point.

For all these reasons, I respectfully request that you accept the position advanced here.

THE COURT: Thank you. Anything further?

MR. [illegible]: I would only correct one point, Your Honor. I said that what there was in the Woods case was a finding of self-dealing, not simply of conflict.

THE COURT: Yes. I recollect that.

Very well. If there is nothing further, we will adjourn court and take the papers.

(Whereupon [illegible] at 12 noon)

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CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript of notes taken by me to record all proceedings at the hearing held on May 18, 1976 in the United States District Court for the District of Connecticut, at Bridgeport, Connecticut, before The Honorable ROBERT P. ANDERSON, United States Circuit Judge.

/s/ Carol J. Beecher
Official Court
Reporter

Dated: 5-28-76

At: Cheshire, Connecticut

A443

In The

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor	No. 30226

STATEMENT OF POSITION OF JACOB D. ZELDES SUCCESSOR INDENTURE TRUSTEE UNDER THE DEBTOR'S GENERAL INCOME MORTGAGE CONCERNING PETITIONS FOR ALLOWANCES UNDER §77(c)(12)

The Nature of the Proceeding

This Statement of Position is submitted by Jacob D. Zeldes, Successor Indenture Trustee under the Debtor's General Income Mortgage (This Successor Trustee). It relates to the petitions, under §77(c)(12) of the Bankruptcy Act, 11 U.S.C. §205(c)(12), for compensation and/or reimbursement of expenses out of the assets of the Debtor's Estate submitted by Chase Manhattan Bank, N.S. ("Chase Manhattan"), Trustee under the Debtor's General Income Mortgage; Manufacturers Hanover Trust Company, as corporate trustee, and A. Frederick Keuthen, Successor Individual Trustee (together referred to as "Manufacturers") under the Debtor's First

and Refunding Mortgage; United States Trust Company of New York ("UST"), trustee under the debtor's Harlem River Division Mortgage; and the New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee (the "Bondholders Committee"). The total amount sought by these petitioners is $5,345,042.40. The Successor Trustee files this statement at this time in light of the fact that although the Reply of Manufacturers Hanover Trust Company was filed in Court on May 14, 1976, it was not placed in the mail to this Successor Trustee until May 19, 1976, the day after the hearing. The statement of position filed by the Bondholders Committee was received on May 18, 1976, the day of the hearing.

This Successor Trustee, in general, agrees with the legal principles set forth in the statement of position submitted by the Trustee of the Debtor (Tr. St.). This Successor Trustee submits this statement to set forth the following contentions:

(1) Under the doctrine in Woods v. City National Bank and Trust Company, 312 U.S. 262 (1941), the petition of Manufacturers for itself and its lawyers should be denied in toto because of Manufacturers' conflicts of interest; and

(2) The amounts sought in all of the petitions should be limited as a maximum to an amount calculated by multiplying the number of hours spent times the hourly rates normally charged by attorneys involved for the years in which the services were actually rendered. There should be added no contingency factor or benefit conferred factor under the facts here.

I. THE MANUFACTURERS' CONFLICTS OF INTEREST REQUIRE DENIAL OF ITS PETITION UNDER THE LEADING CASE OF WOODS V. CITY NATIONAL BANK AND TRUST COMPANY.

A. The Nature of the Conflicts

Manufacturers' conflicts of interest are explained by the Trustee. As stated by the Trustee,

> "in addition to its role as indenture trustee under the Debtor's First and Refunding Mortgage of 1947, Manufacturers was indenture trustee under the 1897 Gold Bond Mortgage of the New York Central and Hudson River Railroad Company and other Penn Central mortgages. Throughout the litigation concerning the price to be paid for the Debtor's properties transferred to Penn Central on December 31, 1968, Manufacturers was indenture trustee for two groups of bondholders with conflicting interests." (Tr. St. 19-20)

The Trustee further points out,

> "Manufacturers is also a creditor of Penn Central. It is one of several bank participants in a $300 million loan to Penn Central under the April 1, 1969 Credit Agreement and one of the banks that loaned $50 million to Pennsylvania Company (a subsidiary of Penn Central) under the March 21, 1970 Credit Agreement. It is also the holder of certain equipment obligations of Penn Central subsidiaries. See Petition of Manufacturers Hanover Trust Co. and A. Frederick Keuthen, 12 New York, N.H. & H.R.R. Reorganization Proceedings 8721, 8722 (June 21, 1971). (Tr. St. 20, n.)

Manufacturers recognized the possibility of its conflicts of interest as early as 1961 when the default under its Indenture with the New Haven occurred. See Petition of Manufacturers Hanover Trust Co. Appendix 4 to Affidavit of Horace J. McAfee, p. 3 (Man. Pet., App. 4, p. 3).

As noted by the Trustee, the Manufacturers as indenture trustee for bondholders in the New Haven Estate while also an indenture

trustee under the 1897 Gold Bond Mortgage of the New York Central and Hudson River Railroad resulted in the Manufacturers being an "indenture trustee for two groups of bondholders with conflicting interests." (Tr. St. 20). But the Trustee's statement that "until Penn Central filed for reorganization in June, 1970, Manufacturers' duties under the Penn Central mortgages were limited to areas unaffected by the conflict" (Tr. St. 20), seems to minimize the actual conflict problems.

This Successor Trustee at this point in the proceedings is basing his factual assertions concerning the conflict on information derived primarily from the Trustee's Statement (Tr. St.) Manufacturers' Petition (Man. Pet.) and Manufacturers' Reply (Man. Reply) in which Manufacturers asserts:

> "To illustrate the problem Manufacturers faced, the only briefs to this Court on behalf of the Penn Central interests dealing with the controversy over the priority of liens on the Grand Central Terminal Properties were those filed by counsel to the Trustee under the Gold Bond Mortgage. In the case of the New Haven, and particularly in connection with the hearings before Judge Van Voorhis, counsel for Manufacturers had by far the greatest familiarity with the record in the Biltmore case, and thus it was in a particularly advantageous position to meet this argument economically and quickly. Presumably, Kelley Drye had similar advantages over any new counsel who might have been brought in on short notice to represent new trustees under the Penn Central Indentures." (Man. Reply 30, n.)

The Trustee under the Gold Bond Mortgage referred to was also Manufacturers.

The conflict arising from the Gold Bond Mortgage situation may not have been brought to this Court's attention until Manufacturers filed on November 10, 1970 its Response Of Manufacturers Hanover Trust Company, As Trustee Under The First And Refunding Mortgage Of The Debtor, To The Statements Of Position Filed By The Interstate Commerce Commission, Manufacturers Hanover Trust Company, As Trustee Under The New York Central and Hudson River Railroad Company Gold Bond Mortgage of 1897, And The Reorganization Trustees Of Penn Central Transportation Company. (Man. Pet., App. 3, p. 8).

While this conflict may have been latent until a default under the Gold Bond Mortgage occurred, or at the very latest when the Penn Central went into reorganization on June 21, 1970, the handwriting was on the wall and was apparently seen by counsel to Manufacturers who was aware of Penn Central's dire financial problems when Manufacturers advised

the United States Supreme Court on December 5, 1969 in the New Haven Inclusion Cases of "the possibility that the Penn Central might become insolvent." (Man. Reply 8, n.).

Manufacturers admits that as of July 1, 1970, counsel considered an application on behalf of Manufacturers to resign as Trustees (Man. Pet., App. 4, p. 49) and outlined to other parties to the reorganization proceedings "the conflict in the position of Manufacturers Hanover as a substantial creditor of Penn Central and as a trustee under a number of Penn Central indentures". (Man. Pet., App. 4, p. 50). Nevertheless, Manufacturers in 1970 continued in its attempts to serve conflicting interests:

> "At this time there was some discussion between McAfee and counsel for Manufacturers Hanover as trustee under another indenture as to certain rights and priorities under the 3-1/2% Gold Bond Mortgage of 1897 and the indenture was studied to ascertain the rights of the New Haven to a lien on one-half of the income of the Grand Central Terminal properties and related aspects of the matter." (Man. Pet., App. 4, p. 50).

Although the Penn Central filed its reorganization petition on June 21, 1970, it was not until one year later, June 21, 1971 that Manufacturers filed its petition to resign due to its conflicts of interest.

Significantly, the affidavit of McAfee describing the services rendered to Manufacturers is replete with references to time spent discussing the conflicts of Manufacturers and the extensive services rendered with respect to the dispute over the Grand Central Terminal properties where there was an actual, real conflict because of the Gold Bond Mortgage situation from the time that a default under that mortgage occurred.

The Manufacturers throughout its Reply speaks of a "potential conflict". Clearly the conflict arising out of the Grand Central controversy was actual and real, and was known to counsel and Manufacturers as indicated by their attempts to cure the conflict by maintaining separate counsel on both sides. There can be no question that the conflict was no longer potential from the moment Penn Central filed its petition for reorganization on June 21, 1970, as recognized by Manufacturers in its petition to withdraw as Trustee under its indenture in the New Haven Estate.

The testimony of Robert A. Byrne, Vice President of Manufacturers reveals not only an awareness of the conflicts, but Manufacturers attempts to insulate itself from its problems by maintaining separate counsel for its conflicting interests, Simpson Thacher and Bartlett to represent Manufacturers as Indenture Trustee in the New Haven beginning in 1947 and Kelley Drye, and Warren to represent Manufacturers as Indenture Trustee in the New York Central where its predecessor, the Hanover Trust had been an indenture trustee since the late 19th century.

Mr. Byrne testified that Kelley Drye had been retained by Manufacturers to represent the corporate trust department in 1961 at the time of the merger of the Hanover Bank with Manufacturers Trust. Simpson, Thacher and Bartlett had represented Manufacturers. He further testified that Simpson Thacher and Bartlett represented Manufacturers in its New Haven interests and that Kelley Drye represented Manufacturers in its New York Central Mortgages, and that it was a "continuing situation". Moreover, he testified that the attorneys from Simpson Thacher and Bartlett and from Kelley Drye dealt with the same people at Manufacturers on these matters. As to the Manufacturers' insulation theory, Mr. Byrne admitted that it was developed on the advice of counsel from both Simpson, Thacher and Bartlett and Kelley Drye. He stated that the two sets of lawyers, as noted, reported to the same personnel at Manufacturers and gave the same oral advice. He was advised by counsel that Manufacturers could not withdraw as Indenture Trustee in the New Haven Estate.

Mr. Byrne testified that this insulation theory was approved neither by the New Haven Reorganization Court nor by the Penn Central Reorganization Court. Manufacturers, according to Mr. Byrne, made no attempt to secure individuals to replace it as Indenture Trustee in the New Haven Estate.

Mr. Byrne never really answered this Court's question:

> "How do you work that and not let your right hand know what your left hand is doing? Do you often do that?"

His reply indicated that Manufacturers did not get into the conflict situation "voluntarily", and that "we did the best we could".

Mr. Byrne made it clear that Manufacturers is still active in the Penn Central Reorganization and he testified further that Manufacturers is still maintaining its position against the interests of the New Haven Estate--a position hostile to Mr. Smith, the New Haven Trustee--by claiming that the New Haven is not a secured creditor in the Penn Central Reorganization and does not have an equitable lien. He testified that he still doesn't think there is a conflict.

Finally, Mr. Byrne stated that his bank Manufacturers Hanover Trust Company would have a moral obligation to pay Thacher and Bartlett if this Court did not. When this Court asked,

"You would what? Have the obligation or pay them?"

Mr. Byrne replied,

"We would pay them."

B. The Woods Case Mandates Denial Of Manufacturers' Petition And Any Other Petition Where A Conflict Of Interest Is Apparent.

The authoritative law to be applied to the conflict of interest issue, as the Trustee acknowledges is the decision of the United States Supreme Court in Woods v. City National Bank and Trust Company, 312 U.S. 262 (1941) discussed in the Trustee's Statement (Tr. St. 23-25). The Woods case like the present situation involved an application by counsel for an indenture

trustee for compensation. The principles of Woods are clear, simple and the law of the land:

(1) Reasonable compensation for services rendered necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act.

(2) Where a claimant who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted.

(3) What is struck at in the refusal to allow compensation is not only the actual evil which results but the tendency to evil in other cases.

(4) Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation.

(5) A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.

(6) Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd." 312 U.S. at 268-269. Strict adherence to the equitable principles enunciated in Woods

requires this Court to deny Manufacturers' petition in toto.

Significantly, Manufacturers offers no justification whatsoever for avoiding the Woods doctrine, which is given only cursory mention by Manufacturers, primarily in a footnote:

> "The Trustee's discussion of the conflicts question is based on Woods v. City Nat'l Bank and Trust Co., 312 U.S. 262 (1941). As the Trustee notes, 'the essential basis for the disallowance of these claims by the reorganization court was that the claimants were pursuing interests of their own that were either of no benefit to the estate or, more often, were adverse to it." (Trustee's Statement, at 24). Woods, therefore, is inapposite since Manufacturers neither pursued any interest of its own nor pursued any interest adverse to the estate. As we show above, and as the Trustee has conceded, its efforts were of great benefit to the estate, and, recognizing the need for its services, Manufacturers felt it could not in good faith resign prior to the decision on remand." (Man. Rep. 29).

Manufacturers' discussion of Woods is misleading. The Trustee's statement as to the basis for the Woods' Reorganization court's decision (Tr. St. 24), quoted by Manufacturers, itself is difficult to authenticate, as no citation is given. This Successor Trustee could not find the District Court Woods opinion, but the Supreme Court stated the rationale of the reorganization Court:

> "The District Court disallowed the claims 'for want of equity.'" 312 U.S. at 264.

Manufacturers claims that "Woods, therefore, is inapposite since Manufacturers neither pursued any interest of its own nor pursued any interest adverse to the estate." However, the holding in Woods is precisely the opposite:

> "Where an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation." 312 U.S. at 268.

Manufacturers' claim that "its efforts were of great benefit to the estate" was expressly dealt with in Woods:

> "A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one." 312 U.S. at 269.

In any event, Manufacturers did pursue interests adverse to the New Haven Estate perhaps as long ago as the default under the Gold Bond Mortgage and, at the very least, since the Penn Central went into reorganization. Moreover, as Mr. Byrne testified, Manufacturers to this very day in the Penn Central Reorganization is still actively pursuing interests adverse to the New Havn Estate and accordingly the interests of the bondholders to whom it owed a fiduciary obligation.

The Trustee suggests that Manufacturers' petition is controlled by Woods only insofar as it relates to the issue of compensation and not legal fees which the Trustee regards as reimbursement of expenses (Tr. St. 30). This distinction seems unfounded since the Woods case dealt explicitly with counsel fees of the indenture trustee:

> "Counsel to the committee was also counsel to the indenture trustee; and its services in the latter capacity were included in the claim of the indenture trustee. 312 U.S. at 264."

When the Woods Court talked about possible reimbursement for expenses, it spelled them out:

> "Thus where taxes have been paid, needful repairs or additions to the property have been made, or the like, equity does not permit the estate to retain those benefits without paying for them." 312 U.S. at 269-270.

The "liberalized" approach in the cases decided by Judge Hand and cited by the Trustee (Tr. St. 27-29) seem not only contrary to Woods, but inappropriate here. In Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2 Cir. 1950), the award of compensation including attorney's fees, as noted by the Trustee, "was paid from the bond series which was fully compensated in the reorganization," (Tr. St. 28) and accordingly reduced, not denied. In this case, however, even assuming the Estate's equitable lien is held valid and full payment is realized, there is every indication that payment of the 2.1 million dollars claimed in Manufacturers' petition will diminish the funds available to the bondholders for whom this Successor Trustee is the Trustee. Silbiger, then, is not controlling.

The breach of trust issue discussed by the Trustee (Tr. St. 28-29) from the case of Beiner v. Equitable Office Building Corp., 175 F.2d 218 (2 Cir. 1949), was treated by Judge Hand as follows:

> "Whether the breach in this case would justify a total disallowance as matter of discretion, we do not undertake to say."

There was no discussion of Woods with respect to this issue.

Manufacturers extended discussion of an indenture trustee's fiduciary obligations prior to the enactment of the Truste Indenture Act of 1939 (Man. Reply 23-28) strengthens the position advocated here by the Successor Trustee. Manufacturers attempts to justify its conflicting role by claiming that "such a practice was considered valid prior to the enactment of the Trust Indenture Act." (Man. Reply 28). But, the act was passed in 1939. Manufacturers then claims that in view of the situation presented and the speed with which it arose" (Man. Reply 29) its conduct was justified. It was from that time on that Manufacturers, even under standards applicable prior to the Trustee Indenture Act, was required to use the same degree of care and skill in its exercise, as a prudent man would exercise under the circumstances in the conduct of his own affairs. As soon as the Manufacturers Gold Bond Mortgage trustee, became the spokesman for the New York Central in the dispute with the New Haven over the Grand Central properties, the conflict was ripe.

Manufacturers concedes that one of the purposes of the Trustee Indenture Act of 1939 was

> "'To assure that the security holders will have the services of a disinterested indenture trusee, and that such trustee will conform to the high standards of conduct now observed by the more conscientious trust institutions. H.R.Rep. No. 1016, 76 Cong., 1st Sess. (1939)." (Man. Reply 24).

Although Manufacturers keeps referring to the Penn Central reorganization as the operative default, its duties to its bondholders under the New Haven Indenture, even accepting Manufacturers version of the applicable standards, required "the services of a disinterested indenture trustee" upon default in 1961.

Manufacturers claims:

> "When the potential conflict of interest arose, as a result of Penn Central's default, Manufacturers successively followed two of the courses of action which were generally accepted practices of indenture trustees." (Man. Reply 26).

In this regard, Manufacturers overstates its case. First, by the time the Penn Central defaulted the conflict was real and blantant not "potential". Secondly, it is nowhere claimed nor was any evidence adduced at the hearing to establish that it was a generally accepted practice to use separate "insulating" counsel, after the passage of the Trustee Indenture Act in 1939.

As to Manufacturers' insualtion theory for which Manufacturers cites no law, the Supreme Court in Woods spoke not of separate disinterested counsel, but of a separate, disinterested indenture trustee. Moreover, as Mr. Byrne testified, separate counsel were responsible to the same officials at Manufacturers, the indenture trustee.

Manufacturers' claim that "the situation was unavoidable" is difficult to accept. Once Manufacturers took an active role in the controversy over the Grand Central Properties, its conflict problems became obvious and it should have taken steps then to withdraw from one side or the other or both. At the very minimum, it

should have consulted the New Haven Reorganization Court to determine a legitimate course of action. In re Haldeman Pipe and Supply Co., 417 F.2d 1302 (9 Cir. 1969). This was never done.

Manufacturers claims:

> "The need for an equitable lien and a constructive trust was clear to the New Haven interests and it was also clear that unless a Successor Trustee could be found, the interests of either one group of bondholders or the other would have been adversely affected by the resignation of its Trustee at this critical state in the litigation." (Man. Reply 30).

By this time the conflict was inescapable. But, it was not as if the New Haven's equitable lien and constructive trust were not pressed by competent counsel, not only by Trustee Smith and his counsel, but also the Bondholders Committee who in fact represented the same interests as the Manufacturers. In fact, Manufacturers, when it ultimately withdrew,. admitted as much when it advised this Court:

> "...they [Manufacturers and the individual Trustee] believe the bondholders' interest have in all respects been fully protected by those acting for the bondholders including, of course, the Petitioners, the Trustees of the Debtor, the First Mortgage 4% Bondholders Committee and others." (Printed Record 8725).

The Trustee states:

> "If the Court considers Manufacturers' activities, in light of its conflict of interest, to warrant either disallowance or reduction of its fee, it is the Trustee's position that the Court should take into account that no question has ever been raised concerning the conduct of its counsel, Simpson, Thacher and Bartlett. Even though, as required under §77(c)(12), the petitioner is Manufacturers, rather than its counsel, and even though counsel can theoretically look to the client for payment, as a practical matter, a reduction in the amount allowed as reimbursement for legal fees is likely to impact persons who, in the Trustee's view, have benefited the Estate and as to whom no misconduct has ever been intimated." (Tr. St. 30).

So that the record is clear this Successor Trustee feels that neither Manufacturers nor its attorneys should receive compensation from the New Haven Estate. The evidence adduced at the hearing makes clear that Manufacturers will pay Simpson, Thacher and Bartlett regardless of what action is taken here. The evidence also makes it clear that Manufacturers received the "insulation theory" advice from its New Haven counsel as well as from its Penn Central counsel and in its reply, prepared by its counsel, there is a suggestion that this theory was valid, if ever, only prior to 1939. This is not to suggest that the attorneys should not be paid, but that payment of 2.1 million dollars simply should not come from the New Haven Estate.

In summary, Manufacturers offers no justification whatsoever for avoiding the Woods doctrine. The Trustee offers a suggestion based on the Second Circuit cases, but these have no application unless it is clear that the fees are being paid by the bond-holders for whom Manufacturers was indenture trustee. Under all these circumstances Manufacturers claim for 2.1 million dollars should be denied in toto. The contentions advanced here by this Successor Trustee with respect to the conflict of interest issue as it bears on the petition of Manufacturers should be considered by this Court with respect to any other pending petition where a conflict of interest was apparent. See Petition of the Chase Manhattan Bank, N.A. and Joseph R. Thompson Concerning

Their Resignation as Corporate Trustee and Individual Trustee, Respectively, Under the General Income Mortgage of the Debtor and for the Appointment of a Successor Trustee or Trustees.

II. THE AMOUNTS SOUGHT IN ALL OF THE PETITIONS SHOULD BE LIMITED AS A MAXIMUM TO AN AMOUNT CALCULATED BY MULTIPLYING THE NUMBER OF HOURS SPENT TIMES THE HOURLY RATES NORMALLY CHARGED BY ATTORNEYS INVOLVED FOR THE YEARS IN WHICH THE SERVICES WERE ACTUALLY RENDERED. THERE SHOULD BE ADDED NO CONTINGENCY FACTOR OR BENEFIT CONFERRED FACTOR UNDER THE FACTS HERE.

This Successor Trustee agrees with the Trustee that

> "the most important factor, and frequently both the starting and ending point in computing the size of the award, is the number of hours logged and the applicable hourly rates." (Tr. St. 9).

This Successor Trustee submits that with respect to the pending petitions, the number of hours logged and the hourly rates normally charged at the time for the work performed should be the only factor in computing the size of the awards. There should be no multiple added for the contingency factor or the benefit conferred.

Precedent establishing the factors for determination of reasonable counsel fees exists in this Court. In Perlman v. Feldmann, 160 F. Supp. 310 (Conn. 1958), Judge Anderson noted that the litigation lasted seven years and

> "[i]nvolved for the attorneys have been approximately 14,000 hours of work. Great weight is given to the contingent nature of fees with its accompanying risk that the stupendous labor and the substantial overhead and expense might go for naught." 160 F.Supp. at 310.

This Court then gave consideration, inter alia, to

> "the prevailing hourly rates of pay for attorneys of different degrees of skill, experience and standing both in Connecticut and New York during the pendency of the case." (Emphasis added) 160 F. Supp. at 311.

In Perlman, unlike the present bankruptcy situation, the plaintiffs

had recovered a great windfall. This Court also took into consideration the contingency factor and the inducement to counsel to prosecute such cases. The hourly fee which this Court allowed came to approximately $32.00 per hour for work done in the 1950's.

More recently, the Second Circuit, In Re Onondaga Operating Corp., 440 F.2d 785 (2 Cir. 1971), per curiam affirmed an award of attorneys fees which reflected "compensation of a mere $12.35 an hour". 440 F.2d at 786.

Significantly, none of the petitioners in this proceeding bases its claim for fees on the hourly rates effective for the lawyers involved at the time the services were rendered. Simpson, Thacher, for example, withdrew from the proceedings in 1971 yet uses its 1974 hourly rates. (Man. Reply 19 n. ***).

Present hourly rates seem inappropriate for the further reason that attorneys fees, like everything else have increased in recent years with the cost of living. What cost $100 in 1967 cost approximately $148 in 1974 and now costs approximately $167. See Consumer Price Index, annexed as Exhibit A. It would seem appropriate, then, to use the hourly rates normally charged for the year that the services were actually rendered and not current rates.

It also seems inappropriate to increase the normal hourly rate for the standing of the particular lawyer involved, since his status, whether a senior partner, junior partner or associate, and the competency of his law firm, would already be reflected in his normal hourly rate.

As to the contingency factor discussed by petitioners and the Trustee, no evidence was offered by any of petitioners to show any contingency. Simpson Thacher, for example, claims that its employment and its fee were "inherently contingent" (Man. Rep. 16), and seeks to justify an additional half million dollars to its fee because of "the difficulty of the work, the uncertainty of compensation and the success of achieved." (Man. Reply 19 n. ***).

The difficulty of the work is reflected in the normal hourly rate for attorneys. The uncertainty of compensation at least with respect to Simpson Thacher is simply not true in light of Mr. Byrne's unequivocal testimony that Manufacturers would pay Simpson Thacher, if this Court did not.

This Successor Trustee suggests that in the consideration of these petitions, the words of Judge Friendly in In Re Mabson Timber Co., 394 F.2d 23 (2 Cir. 1968) are appropriate:

> "Attorney's fees in bankruptcy liquidation are governed by 'the economical spirit of the Bankruptcy Act,' and the amounts which 'private clients are expected and wont to pay for similar services' are not determinative." 394 F.2d at 25

In Cle-Ware Industries, Inc. v. Sokolsky, 493 F.2d 863 (6 Cir. 1974), the bankruptcy proceedings were commenced in 1971, and the attorneys for the debtor requested compensation of $180,000 based on an hourly rate of about $71 and were awarded $162,500. Attorneys for the debtor in possession requested and were granted compensation at an hourly rate of $50. Appellants objected,

inter alia, to the awards as "excessive and inconsistent with the economical spirt of the Bankrupty Act." 493 F.2d at 875. Agreeing with appellants, the Sixth Circuit stated,

> "we find it difficult to conceive any situation which would justify awarding these attorneys' compensation in excess of the hourly rate recommended by the local bar association for such bankruptcy work, however 'masterful' the job. Attorneys who take bankruptcy work do so with advance knowledge that they cannot expect the highest of fees, especially in cases such as this, where the general creditors are paid only five cents on the dollar in cash and face the prospect of receiving no more than twenty cents on the dollar."

Conclusion

For these reasons, then, this Successor Trustee respectfully requests this Court to consider the views expressed here.

Respectfully submitted,

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Debtor's General Income Mortgage

U.S. DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
WASHINGTON, D.C. 20212

A465

CONSUMER PRICE INDEX FOR WAGE EARNERS AND CLERICAL WORKERS

U.S. CITY AVERAGE

ALL ITEMS--SERIES A

(1957-59=100)

YEAR	JAN.	FEB.	MAR.	APR.	MAY	JUNE	JULY	AUG.	SEPT.	OCT.	NOV.	DEC.	AVG.
1946	54.5	54.3	54.7	55.0	55.3	55.9	57.2	60.5	61.2	62.4	63.9	64.4	58.5
1947	66.4	66.3	66.7	66.7	66.5	66.0	66.6	67.3	68.9	68.9	69.3	70.2	66.9
1948	71.0	70.4	70.2	71.2	71.7	72.2	73.1	73.4	73.4	73.1	72.6	72.1	72.1
1949	72.0	71.2	71.4	71.5	71.4	71.5	71.0	71.2	71.5	71.1	71.2	70.8	71.4
1950	70.5	70.3	70.6	70.7	71.0	71.4	72.1	72.7	73.2	73.6	73.9	74.9	72.1
1951	76.1	77.0	77.3	77.4	77.7	77.6	77.7	77.7	78.2	78.4	79.0	79.3	77.8
1952	79.5	79.8	79.8	79.1	79.2	79.6	80.0	80.1	80.0	80.1	80.1	80.0	79.5
1953	79.9	79.5	79.6	79.2	79.5	80.2	80.4	80.6	80.7	80.9	80.6	80.5	80.1
1954	80.7	80.5	80.5	80.3	80.6	80.7	80.7	80.4	80.4	80.2	80.3	80.1	80.5
1955	80.1	80.1	80.1	80.1	80.1	80.1	80.4	80.2	80.5	80.5	80.6	80.4	80.2
1956	80.3	80.3	80.4	80.5	80.9	81.4	81.0	81.9	82.0	82.5	82.5	82.7	81.4
1957	82.8	83.1	83.3	83.6	83.8	84.3	84.7	84.8	84.9	84.9	85.2	85.2	84.3
1958	85.7	85.6	86.1	86.6	86.5	86.7	86.8	86.7	86.7	86.7	86.8	86.7	86.6
1959	86.8	86.7	86.7	86.8	86.9	87.3	87.5	87.4	87.7	88.0	88.0	88.0	87.3
1960	87.9	88.0	88.0	88.3	88.5	88.7	88.7	88.7	88.8	89.2	89.3	89.3	88.7
1961	89.3	89.3	89.3	89.3	89.3	89.4	89.8	89.7	89.9	89.9	89.9	89.9	89.6
1962	90.0	90.1	90.3	90.5	90.5	90.5	90.7	90.7	91.2	91.1	91.1	91.0	90.6
1963	91.1	91.2	91.3	91.3	91.3	91.7	92.1	92.1	92.1	92.2	92.3	92.5	91.7
1964	92.6	92.5	92.5	92.7	92.7	92.9	93.1	93.0	93.2	93.3	93.5	93.6	92.9
1965	93.6	93.5	93.7	93.9	94.2	94.7	94.6	94.6	94.8	94.9	95.1	95.4	94.5
1966	95.4	95.0	95.3	95.7	96.3	97.1	97.4	97.9	98.1	98.5	98.5	98.6	97.2
1967	98.6	98.7	98.9	99.1	99.4	99.7	100.2	100.5	100.7	101.0	101.3	101.5	100.0
1968	102.0	102.4	102.3	103.1	103.4	104.0	104.5	104.8	105.1	105.7	106.1	106.4	104.2
1969	106.7	107.1	108.0	108.7	109.0	109.7	110.2	110.7	111.2	111.6	112.2	112.9	109.8
1970	113.3	113.9	114.5	115.2	115.7	116.3	116.7	116.9	117.5	118.1	118.5	119.1	116.3
1971*	119.2	119.4	119.8	120.2	120.8	121.5	121.8	122.1	122.8	123.3	123.6	123.1	121.3
1972	123.2	123.8	124.0	124.3	124.7	125.0	125.3	125.7	126.5	126.3	126.3	125.3	125.3
1973	127.7	128.6	129.8	130.7	131.5	132.8	132.7	133.1	133.5	133.6	133.8	133.5	132.1
1974**	139.7	141.5	143.1	145.0	146.5	146.9	148.0	149.9	151.7	153.0	154.3	155.4	147.7
1975	156.1	157.3	157.8	159.6	159.3	160.6	162.3	162.8	164.6	164.6	165.6	166.3	161.2p
1976	166.7	167.1	167.5										

p - preliminary estimate

*Indexes for August through October 1971 differ from those originally published. They were recalculated by the U.S. B.L.S. in December 1971 to take into account the refund required by the Revenue Act of 1971 of excise taxes paid on new car purchases during those months.

**The CPI for April through October 1974 has been recalculated to correct for an error in the used car component.

Note: This table has been updated through the use of news releases and other sources and should not be considered as official. For definitive data on the CPI, contact the U. S. Department of Labor, Bureau of Labor Statistics, Washington, D. C. 20210.

CERTIFICATION OF SERVICE

This is to certify that copies of the within statement of position were deposited in the U. S. Mails, first-class postage prepaid, to all parties who are customarily notified of hearings in these proceedings, on May 28, 1976.

Jacob D. Zeldes
Attorney

In The

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 30226

SUPPLEMENTAL REPLY OF MANUFACTURERS HANOVER TRUST COMPANY, AS FORMER TRUSTEE OF THE DEBTOR'S FIRST AND REFUNDING MORTGAGE

Preliminary Statement

On June 1, 1976, Manufacturer's counsel received a copy of a "Statement of Position of Jacob D. Zeldes, Successor Indenture Trustee under the Debtor's General Income Mortgage Concerning Petitions for Allowances under §77(c)(12)." (Zeldes Statement) We are not aware of the authority, if any, under which the Zeldes Statement has been submitted at this time. Should the Court consider its receipt appropriate, we ask that this Supplemental Reply be considered.

Counter-Statement of Facts

The following propositions relied upon in the Zeldes Statement we accept as accurate:

1. At and prior to July 7, 1961, Manufacturers Trust Company was Corporate Trustee under the Debtor's First and Refunding Mortgage.

2. Since 1897, The Hanover Bank has been trustee, inter alia, of the so-called Gold Bond Mortgage of the New York Central and Hudson River Railroad Company and certain other mortgages of the New York Central System (Central).

3. In September 1961, The Hanover Bank merged into Manufacturers Trust Company under the name Manufacturers Hanover Trust Company (Manufacturers).

4. At various times before and since July 7, 1961, Manufacturers has made loans to, and been a creditor of, Central and, after February 1968, of Penn Central.

5. When Penn Central filed a Petition for Reorganization on June 21, 1970, there was an event of default and Penn Central's Gold Bond Mortgage and other Penn Central debts became due.

6. In response to this Court's request of August 10, 1970, Manufacturers, as Trustee, filed two statements of position, with supporting briefs, one, filed by Simpson Thacher & Bartlett, on its behalf as Trustee of the New Haven Mortgage; one, filed by Kelley Drye Newhall Maginnes & Warren, on its behalf as Trustee of the Central Gold Bond Mortgage.

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It filed its statement as New Haven Trustee on the advice of Simpson Thacher & Bartlett that it could not withdraw as trustee, and had to act to protect its cestuis until a successor was appointed.

7. On June 21, 1971, Manufacturers petitioned for the appointment of a successor trustee under the New Haven Mortgage.

The following assertions relied upon in the Zeldes Statement are misleading*:

1. "Manufacturers recognized the possibility of its conflicts of interest as early as 1961." (Zeldes, p. 3)

The potential conflict Manufacturers recognized in 1961 was that which might be occasioned by the fact that, in addition to being Mortgage Trustee for the New Haven, Manufacturers was also a creditor of the New Haven, in part because of its participation in the New Haven flood loans. This situation was set forth in detail in the petition of Manufacturers to intervene dated July 25, 1961 and was the subject of a conference with Judge Anderson (and others) in his chambers in New Haven on July 26, 1961. (Narrative of Services, App. 4 to McAfee Aff. (Narrative), pp. 3, 4.)** The Petition to Intervene was heard September 6, 1961 and was granted by order entered that day.

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* We believe this results from Mr. Zeldes' unfamiliarity with events of which he has only indirect knowledge.

** Mr. Zeldes asserts (Zeldes, p. 7) that this Narrative is "replete" with references to conflicts of interest; on careful review, we find two - the one at pp. 3-4 noted above, and the second, at pp. 49-52, which fully describes the events in late 1970 which led Manufacturers Hanover to resign.

2. "The conflict arising from the Gold Bond Mortgage situation may not have been brought to this Court's attention until . . . November 10, 1970 . . . ." (Zeldes, p. 5)

In fact, Manufacturers' counsel advised counsel for the New Haven Reorganization Trustee on July 1, 1970 that it saw potential conflicts arising out of its role as New Haven Mortgage Trustee and as a creditor of Penn Central and trustee of Penn Central mortgages, and requested that counsel advise the Court of this problem and its desire to resign. The same point was discussed with the Reorganization Trustee or his counsel on several occasions in July and August, 1970, and we were advised that the Court was informed of Manufacturers' concern about its conflicting interest in July, 1970. (Narrative, pp. 49, 50)

3. "While this conflict may have been latent until a default under the Gold Bond Mortgage occurred, or at the very latest when the Penn Central went into reorganization on June 21, 1970, the handwriting was on the wall and was apparently seen by counsel to Manufacturers who was aware of Penn Central's dire financial problems when Manufacturers advised the . . . Supreme Court on December 5, 1969 . . . of 'the possibility that the Penn Central might become insolvent.'" (Zeldes, pp. 5-6)

We can claim no such gift of prophecy as the Zeldes Statement credits us with. What we did point out, as our

Petition for Certiorari to the Supreme Court (p. 20) and our reply statement to this Court (p. 8 fn) made clear, was that this Court's underwriting formula afforded no protection against the possibility of a Penn Central bankruptcy during the nine years the formula was to be in effect.*

4. "The testimony of Robert A. Byrne . . . reveals not only an awareness of the conflicts, but Manufacturers[']attempts to insulate itself from its problems by maintaining separate counsel for its conflicting interests, Simpson Thacher & Bartlett . . . in 1947 and Kelley Drye, and Warren to represent Manufacturers as Indenture Trustee in the New York Central where its predecessor, the Hanover Trust had been an indenture trustee since the late 19th century", etc. (Zeldes Statement, pp. 7-8).

Again, the Zeldes statement attributes prophetic powers that neither Simpson Thacher & Bartlett nor Manufacturers possess. When Simpson Thacher & Bartlett acted for Manufacturers Trust Company on the New Haven Mortgage in and after 1947, it did so as corporate trust and then general counsel for Manufacturers. Likewise, Kelley Drye acted for The Hanover Bank with respect to the Gold Bond Mortgage as Hanover's counsel. There was then no conflict and there was, we submit, likewise none when, after its merger in 1961, Manufacturers

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* Incidentally, the Gold Bond Mortgage default occurred when, and not before, Penn Central filed its petition of June 21, 1970.

assigned its general trust work to Kelley Drye but asked Simpson Thacher & Bartlett to continue to act with respect to the New Haven which was already in reorganization.

It is only true by the sheerest technicality that Manufacturers "retained" Kelley Drye in 1961; what in fact happened is that all trust matters of the merged bank were assigned to Kelley Drye, which thus continued to act with respect to the Gold Bond Mortgage, except that Simpson Thacher & Bartlett was asked to continue to act with respect to the New Haven Mortgage.

5. "As to Manufacturers' insulation theory, Mr. Byrne admitted that it was developed on the advice of counsel from both Simpson, Thacher and Bartlett and Kelley Drye." (Zeldes, p. 8)

This statement repeats the same mischaracterization of Mr. Byrne's testimony as Mr. Zeldes introduced at the May 18, 1976 hearing. Mr. Byrne first made reference to "insulation" in reply to a question by Professor Moore (Tr. 18); he stated that it was the Bank's judgment that it was insulating itself by using different counsel. Mr. Byrne did not state that this was the advice of counsel. The question of the advice of counsel was raised on redirect, where Mr. Byrne testified as follows (Tr. 26):

"Q. Was Manufacturers advised by its counsel, that is to say, Simpson, Thacher and Bartlett on the one hand and Kelley, Drye on the other as to whether or not they could resign, simply resign the Trusteeship[s] in the summer of 1970?

A. We were advised that one could not just flat out resign.

Q. Do you recall what the reason given for that was?

A. Well, the Bondholders had to have a Trustee."

At Tr. 36, Mr. Zeldes asked the following question:

"Q. Now you mentioned that you received, I believe you said on direct examination, the advice of counsel concerning the insulation theory. Was that advice given to you by your attorneys in this proceeding or in the Penn Central proceeding or in both proceedings?

Mr. Bader: I don't believe that was the witness' testimony. The witness' testimony was that he was advised from [sic: by] his counsel they could not withdraw from the trust at that time. . . ."

The witness made this clear in his reply to the court (Tr. 37; emphasis supplied):

"The Court: And it was <u>your</u> thought that in so doing you insulated yourself from any disqualification in so doing?

The Witness: Yes, sir."

However, Mr. Zeldes persisted in his interpretation, and the witness rejected it (Tr. 38; emphasis supplied):

"Q. When you consulted with both of these counsel separately, did they give you the same advice with respect to the insulation theory?

A. <u>It's the best we could do, yes</u>."

Simpson Thacher & Bartlett and apparently Kelley Drye advised Manufacturers that it could not resign its

trusteeships unless and until successors were appointed and that it had to act meanwhile in such fashion as to protect the interests of its cestuis. Simpson Thacher & Bartlett advised the New Haven Trustee and this Court that there was a potential conflict. We understand that Kelley Drye similarly advised the Penn Central Trustees and the Penn Central Court. We know of no one who, in 1970 or 1971, advised the bank that by acting through separate counsel, it was "insulated." Rather, our advice then was that the bank had no choice except to act as it did.

6. ". . . Mr. Byrne's unequivocal testimony that Manufacturers would pay Simpson Thacher if this Court did not. . . ." (Zeldes, p. 21)

This characterization misinterprets Mr. Byrne's testimony, at Tr. 40-41:

"By Mr. Zeldes:

Q. Let me ask you this then. What is the bank's understanding with respect to compensation for your lawyers in this proceeding in the event that the Court should not award any out of the estate?

A. Well, I think we would then discuss it.

Q. Pardon?

A. I think then we would discuss it. We have not reached an agreement or understanding on that point. I think this would be - -

Q. Do you agree with the statement that your lawyer just made that you are under a moral obligation to pay them if that occurs?

A. I think we would.

The Court: You would what, have the obligation or would pay them.

The Witness: We would pay them."

What is clear is that the witness was expressing a personal opinion as to what his superiors at the Bank would decide to do in an eventuality that has not yet arisen. The actual obligation of the Bank vis-a-vis Simpson Thacher & Bartlett and its extent is set forth explicitly in the petition of Manufacturers (page 7, paragraph 3) and in the affidavit of McAfee, in Manufacturers' application for allowances. The pertinent passage of the McAfee affidavit reads as follows:

> "When the New Haven filed its petition for reorganization, Petitioners and ST&B agreed, in view of the provisions of Section 77 of the Bankruptcy Act, that ST&B would be legally entitled to receive as compensation for its services to Petitioners (and reimbursement for its expenses and disbursements) only such amount as was ultimately found by the courts to be reasonably and properly reimbursable to Petitioners out of the assets of the New Haven. However, ST&B stated that in the event such amount was in ST&B's opinion grossly inadequate, ST&B would come to the Corporate Trustee and ask that it be paid additional compensation out of the Corporate Trustee's own funds. The Corporate Trustee agreed to consider any such request but it was expressly understood that it would be under no legal obligation to comply." (paragraph 9, page 9)

Summary of Facts

There is, we believe, no dispute - and no basis for dispute - that there was no foreseen or foreseeable conflict in the position of Manufacturers prior to the filing of the

reorganization petition by Penn Central on June 21, 1970, an event which triggered defaults under the Penn Central mortgages, including the Gold Bond Mortgage.*

Under the thrust of that catastrophe, and the decision of the Supreme Court eight days later, this Court, on August 10, 1970, propounded questions which we - and, we believe, this Court, - thought required urgent responses. While we - and Manufacturers - were aware of the conflict, a fact we disclosed to this Court in July, 1970, and that Kelley Drye disclosed to the Penn Central Reorganization Trustees and to its Reorganization Court, we also felt - and so advised Manufacturers - that while it should resign as soon as possible, it was meanwhile obligated to do its best for its cestuis. Mr. Zeldes suggests (Zeldes, p. 16), that it would have been preferable for Manufacturers to have done nothing in its capacity as New Haven Trustee after June 21, 1970; we find that suggestion meritless. Similarly the Reorganization Trustee implied at the May hearing

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* Mr. Zeldes quotes (at p. 3) the Reorganization Trustee's suggestion that Manufacturers "was indenture trustee for two groups of bondholders with conflicting interests". (Trustee's Statement, p. 20) We did not - and do not - understand the Trustee to contend that Manufacturers was involved in an actual conflict prior to June 21, 1970. In fact, the Trustee's Statement continues, immediately after the material quoted by Mr. Zeldes, in the following language:

> "However, until Penn Central filed for reorganization in June, 1970, Manufacturers' duties under the Penn Central mortgages were limited to areas unaffected by the conflict. . . ." (Trustee's Statement, p. 20)

that we should perhaps have sought the appointment of a special master - and perhaps special counsel - when the conflict appeared. We would observe that such a course was then suggested by no one.

The Question of Law

The relevant question, we submit, is whether having done what it did in 1970, Manufacturers thereby acted in such a fashion as should in equity deny it retrospectively any compensation for the services it rendered to the New Haven from July, 1961 forward, services which we would note no one even now claims were not single-mindedly devoted to the interest of the New Haven and indeed substantially benefited the New Haven. We submit that there is no legal or equitable basis for such a result. To impose a penalty on those who have acted throughout in good faith would be punitive and entirely wanting in that fairness which equity requires.

ARGUMENT

THERE IS NO LEGAL OR EQUITABLE GROUND TO DENY MANUFACTURERS FULL COMPENSATION FOR ITS SERVICES AND FULL REIMBURSEMENT OF EXPENSES INCLUDING ATTORNEYS' FEES

Mr. Zeldes' argument is based entirely on the decision of the Supreme Court in Woods v. City Bank Co., 312 U.S. 262 (1941).* In that case, the Supreme Court affirmed a decision of the District Court denying compensation under the Chandler Act to an indenture trustee,

* As the Trustee noted in his Statement of Position (pp. 28-29), more recent cases have adopted a more flexible position. See, e.g., Silbiger v. Prudence Bonds Corp., 180 F.2d 917 (2d Cir.), cert. denied, 340 U.S. 818 (1950); Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir. 1949).

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a bondholders' committee, and their common counsel "for lack of equity." The facts of Woods are far different from those of the present case. Petitioners in Woods, according to the District Court, conspired to and did use their fiduciary positions to serve their own financial interests at the expense of the bondholders and creditors of the estate. The Supreme Court's opinion provides an outline of the interrelationships through which the Woods petitioners carried out their continuous course of devious conduct.

Briefly, the indenture trustee (City National) was the trustee under real estate mortgages covering three apartment-hotels, Granada, Arlington and Lincoln Park, which were interdependent although operating in competition. The so-called "bondholders committee" of five members, which appointed the trustee, included two employees of the trustee who, with a third, were formerly employed by Cody Trust, a principal underwriter of the bonds and a principal stockholder of the corporation. There were similar committees controlled by the same trustee for Arlington and Lincoln Park which purchased utility services from Granada. Appartently, little, if any, of these interrelations were ever disclosed by the Granada committee in soliciting proxies. Findings 49-50;

312 U.S. at 265. The various committees were, in effect, sections of the trustee's corporate reorganization department. The attorneys were not only counsel for the mortgage trustee of all three buildings and for their committees, but had also previously been counsel for one, if not both, of the principal bond underwriters, one of which was also a principal stockholder in Granada (Findings 44-46; cf. 312 U.S. at 267). Both the lawyers and the committee members were involved in the conflicting situation throughout the reorganization; the indenture trustee was a later arrival.

The unreported findings and conclusions of the District Court, annexed hereto as Exhibit A, reflects the magnitude of the abuses the Court found had been perpetrated by petitioners in Woods and are essential to an understanding of the decision.*

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* Mr. Justice Jackson warned against relying on broad Supreme Court language without investigating the facts of the case to which the language relates in Armour & Co. v. Wantock, 323 U.S. 126, 132-133:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

From these findings, especially findings 26, 28, 34, 40, 41, 44-46, 48, 50, 51, several things are apparent:

First: The conflicts involved went to the very heart of the reorganization. (Finding 50)

Second: They continued through the entire course of the reorganization. (Finding 50)

Third: The conflicts were voluntarily accepted if not sought. (Findings 48 and 50)

Fourth: The conflicts caused losses to the estate. (Finding 45)

Fifth: The District Court at least questioned whether any service of value had been performed. (Findings 40, 44 and 45)

Sixth: The attorneys were equally involved in the conflict. (Finding 50; 362 U.S. at 367)

Under the circumstances, the holding of the Court is hardly surprising - that the District Court was amply justified in exercising its discretion to deny compensation for lack of equity due to the conflicts.

Manufacturers' situation, however, was quite different from that in Woods. The situation Manufacturers faced was one forced upon it by an event over

which it had no control and involved no self-dealing.

Lest there be any confusion about the position of Manufacturers, we do not concede that at any time in the course of its trusteeship of the New Haven Mortgage, Manufacturers, or its counsel, committed any impropriety or breach of trust, or acted in any fashion other than one of single-minded and undivided loyalty to its cestuis. When the conflict arose, Manufacturers, rather than concealing the fact, moved promptly to disclose its existence, and sought relief. In short, the present situation is to be distinguished from that in Woods because Manufacturers, through its counsel, Simpson Thacher & Bartlett, acted to protect the interests of the New Haven bondholders and in so doing, conferred undeniable and unquestioned benefits on the New Haven estate. We respectfully submit that to apply Woods to the facts here would be a perversion of the equitable rules governing the conduct and compensation of fiduciaries.

The logical extension of the arguments set forth by Mr. Zeldes with respect to the proper action to be taken by a trustee in the position Manufacturers found itself is this: that whenever the mortgagor under an indenture files a petition under the Bankruptcy Act, the trustee of that mortgage must either immediately

resign under that indenture or resign as trustee under indentures of any other mortgagors which have or may have any relationship with the bankrupt debtor, no matter how remote, unlikely or contingent. This, we respectfully submit, would be corporate chaos.

Mr. Justice Douglas recognized in Woods that proper expenditures should be allowed:

> "Plainly expenditures are not 'proper' within the meaning of the Act where the claimant cannot show that they were made in furtherance of a project exclusively devoted to the interests of those whom the claimant purported to represent. On the other hand, those expenditures normally should be allowed which have clearly benefited the state. Scott on Trusts (1939), §245.1." 312 U.S. at 269

Mr. Zeldes suggests (Zeldes, pp. 12-13) that the list of allowable expenses in Woods is exhaustive, and that since the indenture trustee's counsel were denied fees in Woods, such counsel fees are not properly reimbursable expenditures here. What Mr. Zeldes fails to note is that in Woods the indenture trustee's legal counsel itself was found to have had a conflict of interest since it was counsel to the indenture trustee, counsel to the committee and counsel to the committees for the other two apartments. Cf. Finding 48. Moreover, Mr. Zeldes erroneously construes Mr. Justice Douglas' statement describing examples of proper expenditures as exclusive by failing to note the sentence following the Court's examples: "Such classification of expenses, at times difficult, rests in the sound discretion of the bankruptcy court." 312 U.S. at 270.

THE CALCULATION OF SIMPSON THACHER & BARTLETT'S FEE

Mr. Zeldes argues that in the computation of any fee to be awarded to Simpson Thacher & Bartlett, "there should be no multiple added for the contingency factor or the benefit conferred." (Zeldes, p. 19). We respectfully submit that this position is in error, both on the law (discussed in our earlier statement at p. 18) and on the facts of the present situation.

As Mr. Zeldes correctly notes (see Manufacturers Reply at pp.18-19) two different methods were employed in calculating Simpson Thacher & Bartlett's requested fee (approximately $1.7 million). The first applied multipliers to Simpson Thacher & Bartlett's aggregate recorded hours, using standard hourly rates for senior partners, junior partners and associates. The second applied to each year's recorded time 1974 hourly rates for attorneys of various status and added the sum of $500,000 in view of the results achieved.

It would seem that Mr. Zeldes has misunderstood the first method Simpson Thacher & Bartlett used. Mr. Zeldes claims that "it also seems inappropriate to increase the normal hourly rate for the standing of the particular lawyer involved, since his status, whether a senior partner, junior partner or associate, and the competency of his law

firm, would already be reflected in his normal hourly rate." (Zeldes, p. 20) At no time in the first calculation of Simpson Thacher & Bartlett's requested fee is the normal hourly rate for the standing of an attorney increased; as we clearly stated in our Reply Brief (p. 20), we have merely used average or standard rates for all hours recorded by each group of attorneys - senior partners, junior partners and associates. No alteration in status is involved.

Mr. Zeldes' criticism of the second approach is equally misplaced. He argues that use of "present hourly rates seem inappropriate for the further reason that attorneys fees, like everything else have increased in recent years with the cost of living. What cost $100 in 1967 cost approximately $148 in 1974 and now costs approximately $167. . . . It would seem appropriate, then, to use the hourly rates normally charged for the year that the services were actually rendered and not current rates." (Zeldes, p. 20) This argument overlooks two crucial factors. Firstly, counsel are unable to seek any imputed interest on fees currently being sought which, in a more ordinary commercial and legal context, would have been billed and obtained on a current basis over the years. Secondly, Mr. Zeldes ignores the converse of his calculations based on the Consumer

Price Index. To use the numbers employed in his own example, $100 received now is the equivalent of $59.88 received in 1967. We thus submit that Mr. Zeldes' calculation, far from attacking the logic of the second method of calculating Simpson Thacher & Bartlett's requested fee, rather supports and reinforces it.

CONCLUSION

We respectfully submit that the application of Manufacturers for compensation and reimbursement of expenses (including attorneys' fees), fees and allowances should be in all respects granted.

Dated: New York, N.Y.
June 4, 1976

Respectfully submitted,

SIMPSON THACHER & BARTLETT

By _____
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IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

OPINION AND ORDER ON APPLICATIONS, PURSUANT TO §77(C) (12) OF THE BANKRUPTCY ACT, FOR COMPENSATION AND FOR REIMBURSEMENT OF EXPENSES INCURRED ON BEHALF OF THE BANKRUPT ESTATE

On August 20, 1975 this court filed an opinion and order pursuant to which there were forwarded to the Interstate Commerce Commission (I.C.C.) certain applications for compensation for services and expenses, rendered and expended by the several applicants for the benefit of the Debtor's estate sometime between July 7, 1961, the date of the filing of the petition for reorganization of The New York, New Haven and Hartford Railroad Company (New Haven Railroad), and a date or dates shortly prior to the filing of the applications.

On February 5, 1976, the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law #94-210) (RRRRA), which had been enacted by Congress, was signed by the President. Section 618(b) of the Act, among other things, provides that the powers and duties of the I.C.C. under §77 of the Bankruptcy Act be terminated on the enactment of the RRRRA into law, as it related to any railroad in reorganization under §77 but not subject to the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.* (the "Rail Act") and one which does not operate any line of railroad and which has transferred all or substantially all of its rail properties to a railroad in reorganization which was

subject to the Rail Act prior to the enactment into law of the RRRRA.

The situation of the New Haven Railroad and the circumstances of its reorganization at that time brought it squarely within the provisions of §618(b) of the RRRRA; and, pursuant to the provisions of that section, all of the powers and duties formerly in the I.C.C. to pass upon the above mentioned claims, vested in this court, as the reorganization court having jurisdiction over the New Haven Railroad, the Debtor, herein.

Therefore all of the applicants filed their claims in this court and have asked that they be allowed and paid. Hearings were held on the petitions on May 10, and June 1, 1976, and the petitions for compensation for services and the allowance of costs have been fully submitted and are presently in the hands of the reorganization court for determination.

The claims made by the parties are as follows:

UNITED STATES TRUST COMPANY OF NEW YORK, Trustee of the Debtor's Harlem River Division Mortgage		
Fees:	$ 75,000.00	
Expenses	12,775.36	
		$ 87,775.36
Carter, Ledyard & Milburn		
Fees:	$ 700,000.00	
Expenses	12,775.36	
		716,029.62
FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE		
No separate fee or expenses are requested at this time.		
Breed, Abbott & Morgan		
Fees:	$ 76,663.20	
Expenses	864.22	
		77,527.42

Migdal, Tenney, Glass & Pollak		
Fees:	$ 1,350,000.00	
Expenses	47,766.88	
		1,397,766.88
Harry P. Lander, Esq.		
Fees:	$ 10,000.00	
Expenses	1,400.00	
		11,400.00
MANUFACTURERS HANOVER TRUST COMPANY as former indenture trustee for the First and Refunding 4% Mortgage Bonds		
Fees:	$ 304,416.67	
Expenses	103,018.34	
		407,435.01
Simpson, Thacher & Bartlett		
Fees:	$ 1,700,000.00	
Expenses	15,234.81	
		1,715,234.81
CHASE MANHATTAN BANK, N.A., as former indenture trustee under the General Income Mortgage Bonds		
Fees:	$ 44,400.00	
Expenses	84,648.83	
		129,048.83
Dewey, Ballantine, Bushby, Palmer & Wood		
Fees:	$ 791,513.00	
	45,176.00	
Expenses	19,605.47	
		856,294.47
LAWRENCE W. IANNOTTI, Successor Trustee under the Debtor's First and Refunding Mortgage		
Fees:	$ 45,660.00	
		45,660.00

Tyler, Cooper, Grant, Bowerman & Keefe

Fees:	$ 30,540.00	
Expenses	4,481.38	
		35,021.38

JACOB D. ZELDES, Successor Indenture Trustee under Debtor's General Income Mortgage
Zeldes, Needle and Cooper, P.C.

Fees:	$ 33,971.00	
Expenses	1,165.91	
		$ 35,136.91

The petitioners, of course, must bear the burden of provir that the services for which compensation is sought under §77(c) (12), measurably benefited the estate and promoted the reorganization of the Debtor. *Woods* v. *City National Bank & Trust Company of Chicago*, 312 U.S. 262, 268 (1941) (Ch. X reorganization); *In Re New York, N.H. & H. R. Co.*, 46 F. Supp. 214 (D. Conn. 1942), *modified and aff'd sub nom. Warren* v. *Palmer*, 132 F.2d 665 (2 Cir. 1942); *In Re Boston & Providence Railroad Corp.*, 428 F.2d 159, 164 (1 Cir. 1970); *In Re Yale Express System, Inc.*, 366 F. Supp. 1376 (S.D.N.Y. 1973) (Ch. X reorganization); *Missouri Pacific R. R. Reorganization*, 212 I.C.C. 622, 665, *aff'd on reconsideration*, 217 I.C.C. 577 (1936). The services must have advanced the course of the reorganization and not impeded it, *In re Boston & Providence R.R.*, 260 F. Supp. 415, 422 (D. Mass. 1966), *cert. denied*, 389 U.S. 974 (1967). Furtherraore, it is the usual rule that they must not be cumulative, overlapping or duplicative of those of other claimants or services rendered by the reorganization trustee and his counsel. *Finn* v. *Childs Co.*, 181 F.2d 431 (2 Cir. 1950) (Ch. X reorganization); *In Re New York, N.H. & H. R. Co.*, *supra*.

A substantial portion of the expenses claimed by each of the petitioners is made up of its attorneys' fees and the attorneys' out-of-pocket expenses. The eligibility of the claims for attorneys' fees, rests upon the same general qualifications as do §77(c) (12) claims generally, that is, the contribution by the

attorney must provide a measurable benefit to the entire estate; it must be closely connected with the process of reorganization; and should be different from or more than a duplication of someone else's contribution.

From the date of the filing of the petition in reorganization, July 7, 1961, to the present time all issues of any substance which have arisen in the proceedings for the reorganization of the New Haven Railroad have been heard and decided by the same reorganization court, the United States District Court for the District of Connecticut. Beside the hearings in the district court there were two additional proceedings in which petitioners' counsel appeared: one was the appeal from the I.C.C.'s decision on the valuation of the property of the New Haven Railroad for the purpose of fixing the price to be paid by the Penn Central Railroad for that property which, pursuant to §5 of the Interstate Commerce Act, was heard by a statutory three-judge court; and the other was the hearing to determine the value of the Grand Central Properties which was assigned by the reorganization court to a special master. The reorganization court was kept fully informed as to the three-judge court proceedings and its holding in the case. At that time both courts were of the opinion that the statutes required decisions by both courts. The Supreme Court's decision in the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), however, ruled that after the Penn Central merger the three-judge court proceedings were no longer necessary. The special master's findings were submitted to the reorganization court, which studied them in detail, and approved and adopted them. All of the proceedings and activities upon which the petitioners' claims are based, took place before the same court and the same judge who is now entertaining and passing upon these petitions—a circumstance which affords the court the opportunity to bring to bear upon the claims, firsthand observation and a direct line of sight on the relevant bases of evaluation.

One of the above mentioned generally adopted principles which apply to cases of this kind, is that the services for which compensation is sought are not cumulative, overlapping, or duplicative

of those of other claimants, particularly of the reorganization trustees or their counsel. On the other hand, this rule must not be applied so as to deny compensation altogether, to representatives of parties which the Bankruptcy Act contemplates should take an active part in reorganization proceedings, merely because on certain issues their various interests may converge. See *In Re TMT Trailer Ferry, Inc.* 434 F.2d 804, 807-08 (5 Cir. 1970); 6A Collier on Bankruptcy ¶13.10, at 967-69 (14th ed. 1972). Where different counsel contribute different or additional points of view on a given subject, even though all may be working toward a similar ultimate end, there is a benefit to the debtor's estate, at the very least, where the issues have been more fully defined or more thoroughly analyzed and presented. Such a benefit, when it occurs, may properly be recognized in the granting of allowances. Cf. *In Re New York, Ontario and Western Railway Co.*, 171 F. Supp. 634, 639-40 (S.D.N.Y. 1958). Where, on the other hand, one party does nothing more than repeat the position of another, the debtor should not be required to pay for the duplication of effort. See *In Re New York, N.H. & H. R. Co., supra*, 46 F. Supp. at 222, 224.

Compared with some railroad reorganizations and comparable Chapter X cases, the number of claimants in the present case is not unusually great, but there are overlapping interests as well as divergent interests. The indenture trustees and their counsel, as well as the 4% Bondholders Committee, as the record clearly shows, exerted every effort to preserve the Debtor's estate and to achieve through the necessary litigation a reasonably fair valuation of the assets of the estate. During the periods within which they held their respective positions, the indenture trustees and the committee and their counsel participated in all of the hearings by briefs and arguments as well as by presentation of evidence where necessary, on the many occasions in which these objectives—*i.e.*, the preservation of the Debtor's estate and the achievement of a fair valuation — were at issue. The reorganization trustees' sought to pursue these same objectives but they were compelled to give a great deal of weight and consideration to the factor of the public interest which was heavily involved in keeping the

transportation system of the New Haven Railroad in operation to avoid the devastating economic consequences to southern New England of a cessation of freight operations, in addition to the loss of jobs to well over 9,000 employees and the loss of transportation facilities to thousands of regular passengers. The reorganization proceedings started with an empty treasury. The federal government made a *loan* of $12,500,000 which temporarily permitted the New Haven Railroad to continue its operations, but it must be borne in mind that, unlike the Government's present activities in relief of the railroads, the federal government did not by way of grant or similar assistance give the New Haven Railroad a single dollar. On December 31, 1968, in an action dictated primarily by the public interest, the transportation plant of the New Haven Railroad was conveyed to the Penn Central as the sole means of keeping the trains going. Meanwhile, from July 7, 1961 to December 31, 1968 the New Haven Railroad, to operate, had to live on its own flesh and did so. The assets, insufficient to cover the obligations under the two series of bonds were eroded and depleted to the extent of 65 – 70 million dollars in value. See *New Haven Inclusion Cases, supra.* In the face of these problems the petitioners presented the arguments for preserving the Debtor's estate with clarity and skill, based upon pains-taking and extremely helpful analyses.

The record shows that there were innumerable issues, mostly new and complex, which arose out of the effort, on the one hand, to preserve the Debtor's estate and, on the other, to satisfy the demands of the public interest. The court was constantly required to balance these interests and make the necessary decisions. Without the adversary presentations, the balancing process would have been very difficult, if not impossible.

Obviously the estate should not be charged for duplicated services, and, to the extent that there is such duplication, compensation for an overall contribution must be discounted. Likewise, legal services directed to advancing the separate and distinct interests of the attorneys' client-petitioner, and not the estate as a whole, must be disregarded. In the present case the services

of petitioners' counsel were almost entirely directed at preserving and enhancing the value of the Debtor's estate. That this could result in an ultimately greater recovery by the petitioners themselves does not militate against a right to compensation. Any duplications of service among the petitioners or with the work of the reorganization trustees and their counsel were relatively small. It is apparent from the record that they made a conscious effort to avoid this. Though the positions and objectives of two or more of them and those of the reorganization trustees might parallel each other (in which case, by agreement, only one presentation would be made), the issues were usually so complex that different interpretations and approaches were available and were separately presented by the different petitioners. This afforded the court a thorough analysis of an issue from varying points of view, which was a great aid to the court and made a valuable contribution to the reorganization proceedings. Any repetition or duplication involved, which did not serve any useful purpose, was in no instance substantial. To the extent that it did appear in the contribution of any petitioner or its counsel, it has been taken into account in fixing compensation.

On August 20, 1975 this court drafted and filed an opinion and order, ruling upon applications by the petitioners to exercise its general equity powers and order payment of interim compensation at that time. While the court declined because, under the law as it then stood, it was the duty and function of the I.C.C. to pass upon such claims, the court did, to a limited extent, discuss the claims for compensation and expenses. A portion of what was said then is repeated here:

> "In this connection a principal claim of the petitioners for having rendered services of substantial benefit to the bankruptcy estate and in aid of the reorganization plan stems from their services in connection with the valuation of the property of the New Haven Railroad which was transferred to the Penn Central. The Trustees for the New Haven Railroad in reorganization had negotiated at length and in great detail with the Pennsylvania and New York Central Railroads in an effort to avoid lengthy and costly litigation.

A tentative agreement was ultimately reached, in the amount of approximately $125,000,000, which the reorganization court authorized the Trustees of the New Haven to submit to the Commission on October 24, 1966 and which was subsequently approved by the Commission; but it was never submitted to the reorganization court.

Thereafter in the proceedings, the Trustees for the New Haven felt that, having made the tentative agreement, there would be some impropriety in their going back to the Railroads, which merged on February 1, 1968 as the Penn Central, to attempt to get a higher price. The court considered their position to be understandable and proper. See *New Haven Inclusion Cases*, 399 U.S. 392, 410 notes 45 and 46 (1970). The petitioners, however, were not bound by the agreement and, using the $125,000,000 of the agreement as a point of departure, they pressed for a higher price. Ultimately it was fixed by the courts at approximately $174,600,000."

See *New Haven Inclusion Cases, supra.*

The I.C.C., after reviewing the agreement, fixed a value for the New Haven Railroad of $125,000,000. Afterward, certain errors were shown to have been made in this computation which had caused the value to be underestimated by about $24,600,000. These errors were: (1) a double deduction of $16,200,000 for real estate taxes; (2) a failure to discount to present worth the expenses of liquidation, a factor which made a difference of $3,800,000; and (3) an increase of $4,600,000 in the appraisal of Bronx Yards by including the accidentally omitted feature of rail connection.

With regard to the amount of compensation which should be allowed, this must, of course, vary from case to case, depending upon the size, difficulty and complexity of the case and its issues, the need for the particular services performed by the petitioner and the nature and importance of the benefit which accrued to the estate and the reorganization proceedings. In the present case

the contributions made by the attorneys in the context of a railroad reorganization which, barring a relatively small initial loan, had to continue operations without cash and without credit, took on particular importance. Recent decisions in this Circuit on the subject of calculating attorney's fees, as they may apply to the present case, have laid considerable emphasis on the hours spent by counsel in working on the case, his standing at the bar, as well as the standing of his opponents, the magnitude and complexity of the litigation, and the responsibility involved and the result achieved. *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2 Cir. 1974); *Trans World Airlines, Inc.* v. *Hughes*, 312 F. Supp. 478 (S.D.N.Y. 1970), *modified on appeal*, 449 F.2d 51 (2 Cir. 1971), *reversed on other grounds sub nom. Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973). Outside of being a point of beginning and a rough initial indicator, time spent can, in itself, have no conclusive meaning. The contribution to the Debtor's estate and its reorganization must be judged in the light of the quality and value of the work produced.[2]

Allowances for compensation and expenses have usually been made in connection with an approved and confirmed plan of reorganization. *In re United Cigar Stores Co. of America*, 21 F. Supp. 869, 875 (S.D.N.Y. 1937); *Savannah & A. Ry. Reorganization*, 228 I.C.C. 543, 558 (1938). But where there was sound reason to believe that the reorganization proceedings would not be concluded for a long period of time, the Commission in a recent case took the position that it was unfair to qualified claimants to be required to bear the burden of indefinite delay before being paid. In *Penn Central Transportation Co. Reorganization (Compensation)*, 348 I.C.C. 50 (1975), it permitted interim allowances under §77(c) (12) in advance of any reorganization plan proceedings. In the present case the reorganization trustee formulated and filed a plan with the I.C.C., but, after the merger with the Penn Central and after that Railroad went into reorganization, the New Haven trustee's plan became dependent upon and subject to the reorganization plan of the Penn Central, which will not, in all probably, be filed and approved for a long time to

come. Therefore, in fairness to the petitioners, the court is of the opinion that their petitions for allowances under §77(c) (12) should be determined now.

Another factor which must be considered is the assertion by the petitioners that the expense for attorneys' fees, in the circumstances of this case, should be regarded as in the nature of contingent fees which are usually somewhat higher than ordinary attorneys' fees because the attorney has agreed to look only to the gross amount recovered in the action and meanwhile to bear the costs and expenses of the litigation. If there is no recovery, he stands to lose whatever he has put into the case in services and money. The evidentiary material in the case does not show in express terms what fee arrangements were made by and between each of the petitioners and their counsel. Attorneys' fees are presented here as expenses of the petitioners, and there were implications by some that it was not contemplated that their attorneys would be left with a loss, but that the petitioners were first to seek reimbursement of attorneys' fees from the court under §77(c) (12). There does appear to have been a contingent fee aspect to the attorney-petitioner arrangement in the cases of the First Mortgage 4% Bondholders Committee, the Manufacturers Hanover Trust Company and the Chase Manhattan Bank, N.A., and in due course, consideration will be given to it. While the attorneys for the petitioners participated in the proceedings leading up to and including the procuring of a judgment of the Supreme Court of the United States, fixing the amount due by the Penn Central to the New Haven Railroad for the inclusion of the property of the New Haven at $174,600,000, that sum has not been paid and is due with interest. There is, therefore, no recovery in money against which a contingent fee can be measured. It will be necessary for this court to reserve jurisdiction on that matter.

There are a few other matters of general application which concern the compensation for services and expenses. It will be noted that the court has disallowed the very large sums, mostly hours of work by attorneys and clerical and secretarial assistance

in preparing the applications for fees and expenses for presentation to the I.C.C. in compliance with its detailed specifications under Rule 51 of the I.C.C.; 49 C.F.R. §1100.51. The court has no such elaborate requirements. It is sufficient if the applications reflect the time records, nature of work performed at those times, the rates of compensation, and moneys received and expended and the reasons for them; and it should appear that the records are accurate and are such as are kept by a prudent attorney in the regular course of his practice. It is not customary for an attorney to make a special charge for drafting a bill and presenting it to his client. The I.C.C. created a special set of requirements and, in view of it, allowed the charge in several cases; in others, inexplicably, it did not. There is no reason, however, why that item of cost should be borne by the Debtor's estate.

The court made an estimate of the portions of the claimed attorneys' fees, charged on the basis of current rates of pay rather than the rates which obtained for like work when the work was performed. In its computations the court made adjustments so that the latter standard would prevail. It is true that there was no allowance for interest, and there ordinarily would be some justification for seeking payment of past charges in terms of present dollar values.

In this case, however, the opposite rule must prevail. From time to time, as long ago as seven or eight years, the court formally and informally suggested that the petitioners prepare and file their claims for compensation and expenses but this was never done. Some discretion as to filing the claims was left with the lawyers, but no reason was ever given at the time to explain why they did not do so.

In each of the computations for services of indenture trustees and counsel, the first or basic estimate concerned "watchdog services." Allowances for such activities are proper. An indenture trustee serves in a fiduciary capacity, *Woods, supra;* see the Trust Indenture Act of 1939, 15 U.S.C. §§77aaa *et seq.*, and is under a duty to look out for the bondholders' interests in reorganization and to guard the value of the assets underlying those

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interests. It also means that the trustee must "keep informed of [the reorganization] proceedings and participate therein," *In Re Hudson & Manhattan Railroad Company*, 224 F. Supp. 815, 829 (S.D.N.Y. 1963), *modified on other grounds*, 339 F.2d 114 (2 Cir. 1964), and to offer suggestions and otherwise intervene where necessary to perform its functions. Generally such services aid the administration of the estate and the reorganization of the debtor, and may be compensated out of the estate. See *In Re New York, Ontario and Western Railway Co., supra*, 171 F. Supp. at 637-38, 639-40.

With regard to the First Mortgage 4% Bondholders Committee and its counsel, the Migdal, Tenney firm, it should be noted that they are, in effect, only volunteers and are not acting in pursuance of a fiduciary duty as the indenture trustees are. The Committee is not entitled to receive compensation or reimbursement of expenses for "watchdog" services, as such. The Bondholders Committee was likewise so limited in regard to the expense of counsel fees during the period when Breed, Abbott & Morgan served as its attorney.

The Committee has now moved to file a claim for its expenses, July 8, 1961 — December 31, 1973. Not having previously made a timely filing, the motion is denied.

The court has considered the question of unnecessary duplication of proffered benefits to the New Haven estate by two or more petitioners and has discussed it, *supra*. Where the court has been of the opinion that some duplication has occurred in situations where a petitioner has duplicated the work of the reorganization trustee or his counsel or the work of another petitioner who is carrying the main burden on the issue, some deduction has been made from the claim of the duplicator.

The court made reference, above, to the enactment of the RRRRA of 1976, which became law on February 5, 1976. On April 14, 1976 in ruling on the effect of the new law, the court held in Order #795(A) (B) and (C) that all of the powers and duties formerly in the I.C.C. to pass upon claims made for

services and expenses under §77(c) (12) against the estate of the New Haven Railroad in reorganization vested in this court, and this is so regardless of whether the services were rendered and the expenses were incurred before or after the date on which the RRRRA of 1976 became law.

This court will now briefly summarize in general terms the major contributions made by each of the petitioners, and their respective counsel, for the benefit of the Debtor's estate and, with regard to each, the fair and reasonable compensation and the reimbursement of expenses which are allowed.

1. UNITED STATES TRUST COMPANY OF NEW YORK, Trustee of the Debtor's Harlem River Division Mortgage under the Debtor's Indenture of First Mortgage dated January 1, 1953.

The evidentiary material shows that United States Trust Company incurred and expended $275.36 in expenses connected with its services on behalf of the Debtor's estate, and that neither the nature or amount of these expenses is contested. The court finds that the expenses were made, as alleged, that they were reasonable and necessary and they are approved and allowed under §77(c) (12), and are ordered reimbursed as hereinafter set forth.

The evidentiary material further shows that United States Trust Company incurred and expended $12,500 in payment for the services of H S Equities, Inc., successor to Hayden, Stone Incorporated, an investment banking firm, for services rendered from November, 1967 through April, 1968, as consulting economists and investment counselors, specializing in railroad securities. The court finds that this fee was incurred in the course of affording United States Trust Company additional information and education to enable it to perform its duty as trustee. It was chiefly for the purpose of protecting and enhancing the safety and value of the Harlem River Division Bonds, and is not chargeable to the Debtor's estate.

United States Trust Company, among other things, cooperated with the Debtor's estate in attempts to obtain tax relief from

state authorities, and in the construction of necessary betterments to railroad property. It met with its counsel and representatives of the Debtor to discuss a bond purchase program which would simplify the Debtor's financial structure and generally benefit participants in these proceedings. It also reviewed the question of using funds on deposit with it, as trustee, for the open market purchase and retirement of Harlem River Division bonds. It examined appraisals and agreements in connection with its participation in the sale for $1,205,000 of certain property subject to the Harlem River Division mortgage. It drafted, with the assistance of its counsel, the indenture for the Bonds assumed by the Penn Central.

While the court is satisfied that the United States Trust Company made a valuable contribution to the Debtor's estate in advocating and promoting the assumption by the Penn Central of the Harlem River mortgage debt, a substantial proportion of the effort and skill was devoted to protecting and enhancing the safety and value of the bonds for the direct benefit of the Harlem River Division bondholders, who should bear some of the expense. The court also finds that the representations set forth in the Trust Company's Exhibit C of its petition for allowances for compensation and expenses, dated June 12, 1975, *i.e.*, the affidavit of J. Sinclair Armstrong, Executive Vice President of United States Trust Company of New York, are true but, as stated in the affidavit, "[the] valuation of reasonable compensation for the Trust Company's services is based upon the substantial benefits which have accrued to the Debtor and to the Harlem River Division bondholders . . . ." It is the opinion of the court, therefore, that the fair share of the claim to be paid by the Debtor's estate as hereinafter set forth is $45,000.

1(a). *Carter, Ledyard & Milburn*, counsel for United States Trust Company, July 7, 1961 — April 1, 1975.

The evidentiary material shows that counsel incurred and expended $15,182.40 in connection with its services on behalf of the Debtor's estate, and that neither the nature or amount of

these expenses is contested. The court finds that the expenses were made as alleged, that they were reasonable and necessary and they are approved and allowed under §77(c) (12), and are ordered reimbursed, as hereinafter set forth.

In Exhibit A of the petition for compensation—the affidavit of Mr. Kernan which the court finds to be true—the firm of Carter, Ledyard & Milburn describe, *inter alia*, the most significant contributions made by them to the Debtor's estate. These are their separate and distinct efforts in connection with (1) the assumption of the Harlem River Division Bonds by the Penn Central; (2) the increase of $4,000,000 in the valuation of the Bronx freight yards brought about by the discovery on the second round of Commission hearings that the real estate valuation witness, Mr. McCann, had assumed lack of rail services to the Bronx freight yards; (3) the defeat of "six-months" claimants for priority status; (4) the prompt inclusion of the Debtor in the merger of the Pennsylvania and New York Central Railroads; and (5) the sale of a portion of the Oak Point Yard, which was subject to the Harlem River Division mortgage, with the result that the $1,205,000 proceeds from the sale are deposited in the registry of this court where they are now held, thus creating a fund which inures to the benefit of the Debtor's estate.

As stated by the court in ruling on the petition of the United States Trust Company, *supra*, a valuable contribution to the Debtor's estate resulted from the assumption by the Penn Central of the Harlem River mortgage debt, but a substantial proportion of the effort and skill was devoted to protecting and enhancing the safety and value of the bonds for the direct benefit of the Harlem River Division bondholders, who should bear some of the expense. This statement applies equally well to the United States Trust Company's counsel's participation in the litigation concerning the "six-months" claimants for priority status. They took an active part in this and contributed to its success, but the main responsibility for this litigation rested on Simpson, Thacher & Bartlett, together with counsel for the reorganization trustees.

After taking into consideration (a) the change in value of the dollar between 1969, the date when the court suggested the parties submit their claims for compensation, and 1975; (b) any alleged unnecessary duplication of services by counsel for the respective petitioners; and (c) the benefit to the Debtor's estate, as a whole, it is the opinion of the court that the fair share to be paid by the Debtor's estate, as hereinafter set forth, of the claim by Carter, Ledyard & Milburn for compensation for the services rendered in this case is $450,000. It is a complete and final fee and it carries with it no contingency fee, interest or rights.

2. The First Mortgage, 4% Bondholders Committee.

No application has been made for services or expenses on behalf of the Committee, itself, and none is allowed.

2(a). *Breed, Abbott & Morgan*, counsel for the First Mortgage 4% Bondholders Committee, July 8, 1961 — October 10, 1966.

The court finds that counsel's expenses in the amount of $864.22 were incurred in connection with the services of counsel, rendered for the benefit of the estate of the Debtor, the New Haven Railroad in reorganization, and that they were reasonable and necessary. They are, therefore, approved for payment under §77(c) (12) and are ordered reimbursed to counsel as hereinafter set forth.

With regard to the attorneys' claim for services, the court accepts as true the representations and statements made in that portion of their affidavit which details the work performed. There is a grave difficulty however, involved in it, which stems from the fact that services rendered exclusively for the benefit of the 4% Bondholders Committee are indiscriminately merged and intermingled with those rendered for the benefit of the bankruptcy estate of the New Haven as a whole. It is only the latter which are compensable out of the funds of the Debtor.

Out of all of the items of service mentioned, about one-half can be said to have been of general benefit to the New Haven estate in its entirety. Weighing these in the light of their nature and importance the court concludes that just and fair compensation for the services performed is $42,200 which is to be paid out of the Debtor's estate as hereinafter set forth.

2(b). *Migdal, Tenney, Glass & Pollak*, counsel for the First Mortgage 4½ Bondholders Committee, October 20, 1966 — December 31, 1973.

The evidentiary material shows that counsel incurred and expended $47,766.88 in expenses connected with its services on behalf of the Debtor's estate, and that neither the nature or amount of these expenses is contested. The court finds that, except for fees and expenses incurred in connection with the Penn Central reorganization proceedings (or the New Haven Railroad's interest therein) in the Eastern District of Pennsylvania, which are disallowed, the expenses were made as alleged, that they were reasonable and necessary and are approved and allowed under §77(c) (12), and are ordered reimbursed in the amount of $43,500.88 as hereinafter set forth.

The Migdal, Tenney firm succeeded the firm of Breed, Abbott & Morgan who were counsel for the Committee July 8, 1961 — October 10, 1966. At that time the New Haven Railroad reorganization proceedings had been going on for more than five and one-half years. It was necessary that the newly retained counsel thoroughly familiarize themselves with the history and records of the proceedings up to that time and to weigh and consider the condition of the Debtor and the prospects for a successful reorganization. They noted the rapid erosion of the assets of the Debtor due to continuing operational losses. The I.C.C. had approved the Penn Central merger subject to the condition that the New Haven Railroad be included "on fair and equitable terms." The reorganization trustees had entered into a purchase agreement with the Pennsylvania and New York Central Railroads, and counsel for the Committee made a study and analysis

of the agreement. They objected to several of its provisions. They brought a suit in the United States District Court for the Southern District of New York seeking to enjoin the merger unless the New Haven was simultaneously included and unless adequate traffic protective conditions were imposed upon the Penn Central and parties participating in the *Penn Central Merger Cases*, 389 U.S. 486 (1968), both of which affected the Debtor's estate and contributed to the latter's enhancement of its value. All of these activities on the part of the Committee's counsel were designed to influence the reorganization in a direction which would stem the continuing losses and enhance the value of the assets. The reorganization trustees and the indenture trustees and their counsel were pursuing the same objectives but their arguments and the means proposed were not the same and there was little duplication in the proposals and arguments. After the Commission's review and report, its determination was certified to the reorganization court for review. Among the points raised, the Committee's counsel objected that the New Haven's interest in the Grand Central Terminal properties was improperly defined. They sought permission from the reorganization court to commence a plenary action in the courts of the State of New York to determine the rights of the New Haven in these properties. Because such an action could not be concluded in less than four or five years, the court in response denied that motion. Later, however, the court appointed a special master to make findings and report on this issue. The reorganization court adopted the special master's conclusions which enhanced the Debtor's position. At the time the I.C.C. issued its Fourth Supplemental Report, the 4% Bondholders Committee and the other creditors brought an action before the three-judge court, protesting the inadequacy of the increase granted by the Commission in this latest report, which was also certified to the reorganization court for review. The counsel for the Committee argued certain distinct objections to the Fourth Supplemental Report and the decision by the Commission, before both courts. The judgments of the three-judge court and the reorganization court each increased the purchase price for the New Haven substantially. The Committee's counsel

subsequently appealed from the judgments of both courts, as did others of the creditors, and counsel argued before the Supreme Court the point that the underwriting provision in the reorganization court's judgment did not provide a proper equivalent for the property turned over by the New Haven to Penn Central. The case was argued before the Supreme Court by counsel's senior partner, Mr. Migdal, with Mr. Seymour, senior partner of counsel for the indenture trustee under the First and Refunding Mortgage Bonds and by special counsel, Mr. Auerbach, for the reorganization trustees. The Supreme Court resolved the matter of having two courts adjudicating the price issue and declared that the three-judge court under §5 of the Interstate Commerce Act was not required under these circumstances and set aside its judgment.

Important but different arguments were made by the three counsel. Mr. Migdal made the rebuttal argument. The judgment of the reorganization court was affirmed in part but vacated and remanded in part for further consideration of the form and nature of the payment by the Penn Central to the New Haven Railroad for its assets.

In the early stages of the inclusion proceedings there were negotiations between the New Haven Railroad creditors and the Pennsylvania and New York Central Railroads seeking a settlement of the pending issue. Mr. Migdal acted as lead counsel for the creditors in these negotiations. The negotiations did not succeed. The reorganization trustees of the New Haven Railroad did not participate as they felt bound by the agreement made with the two Railroads. The offer made by the Railroads was less than what the New Haven Railroad creditors were willing to accept and the judgment subsequently awarded by the Supreme Court was greatly in excess of any offer made to the creditors.

Pursuant to an order of this court, the reorganization trustees, in September, 1967, were authorized to file the second step of the two-step plan of reorganization with the I.C.C. Problems arose as to possible inferences which might be drawn from the form in which the order was issued. The Bondholders Committee through its counsel appealed to the Second Circuit which modified

the order as the Committee requested. Subsequently the I.C.C. issued its report following evidentiary hearings on "Step II" of the plan of reorganization. These hearings were followed by the Commission's report which also contained the I.C.C.'s reconsideration of the purchase price issue remanded to it by the reorganization court and the three-judge court and the issue of the approval of "Step II." When the plan was certified to this court, counsel for the Committee raised questions as to various portions of it, which the court found had merit, but it refused to pass upon the plan until final resolution of the amount to be paid by the Penn Central for the New Haven Railroad's assets had been made. The Committee's counsel participated in many occasions in conferences with counsel for the reorganization trustees and with counsel for the indenture trustees about various details of the proposed plan of reorganization and they made constructive suggestions with respect to the provisions of the plan and the tax consequences which would flow from it. Subsequent to the Penn Central's going into reorganization and the filing of the decision of the Supreme Court in the *New Haven Inclusion Cases*, they followed closely the Penn Central reorganization as it affected or as it was likely to affect the interests of the New Haven Railroad's estate. Although it was not granted leave to intervene in the Penn Central proceedings, it made suggestions or recommendations directly to the New Haven Railroad's trustee for his consideration.

After October 10, 1966 there were before the court no issues of significant importance relating to the New Haven Railroad's reorganization and its efforts to preserve and enhance its assets in which counsel for the 4½ Bondholders Committee was not heard or did not participate. While neither the reorganization court nor the reorganization trustee and his counsel, and the indenture trustees and their respective counsel were in full agreement, nevertheless the Debtor's estate and the course of the reorganization were benefited by the constructive and informed criticism for and against the many proposals which arose out of the myriad of complex issues in the case.

In general the Committee's counsel's narrative account of their activities is found by the court to be a correct statement of their participation in this reorganization and the fair and reasonable value of those services in this case is $632,015, plus such contingent addition as may later eventuate in accordance with a provision hereinafter recited.

2(c). There is incorporated into the claims for counsel fees filed by the First Mortgage 4% Bondholders Committee, the claim of Harry P. Lander, Esq., of New Haven, Connecticut, who was retained by the firms of Reed, Abbott & Morgan and Migdal, Tenney, Glass & Pollak as their representative Connecticut counsel. Mr. Lander's fees for service are fixed by the court at $2,000 and his out-of-pocket expenses at $900. These fees and expenses are to be paid out of the Debtor's estate as hereinafter set forth.

3. Manufacturers Hanover Trust Company, as Indenture Trustee for the Debtor's First and Refunding Mortgage.

With regard to the expenses incurred by the indenture trustee, none of the items has been contested. It is noted that, as set out in the affidavit of Mr. Kaestner, a Senior Vice President of the petitioner, the item of $91,398.26, an advance to Simpson, Thacher & Bartlett, has been properly deleted because it is reimbursable. The court finds the account of the sums expended is correct and that they were reasonable and necessary. They are, therefore, approved and allowed under §77(c) (12), and ordered to be paid as hereinafter set forth by the reorganization trustee to the petitioner in the amount of $103,018.34.

As far as services of the Manufacturers Hanover Trust Company as indenture trustee are concerned, the court would, on careful review, ordinarily find that there was sufficient unchallenged and competent evidence to qualify them as legitimate charges *except* for the fact that, subsequent to the Penn Central's filing of its petition in reorganization while the Manufacturers Hanover Trust Company was acting as indenture trustee for the New Haven's First and Refunding Mortgage (from which position it

resigned on June 21, 1971), it was required as indenture trustee for New York Central and/or Pennsylvania Railroad bonds to take certain actions *against* the interests of the estate of the New Haven Railroad in bankruptcy and did so. The circumstances were described in this court's opinion and order of August 20, 1975 in this case, which are repeated as follows:

> "It appears that Manufacturers, as indenture trustee for the New Haven's First and Refunding Mortgage, was on December 31, 1968 also indenture trustee for 18 mortgages of the New York Central and/or the Pennsylvania Railroads then merged into the Penn Central Transportation Company. This circumstance produced no conflicts between the interests of the various bondholders until after the Penn Central filed its application for reorganization on June 21, 1970 and after the Supreme Court decision in the *New Haven Inclusion Cases* on June 29, 1970. In August, 1970 the New Haven reorganization court called for statements of position by the parties in interest relative to the remand ordered by the Supreme Court in the *Inclusion Cases*. There arose at that time an important issue in which the Manufacturers, as indenture trustee for the New Haven's First and Refunding Mortgage and represented by the Simpson, Thacher firm of attorneys, was sharply at odds with the Manufacturers, as indenture trustee of the New York Central and Hudson River Railroad Company Gold Bond mortgage [in which capacity the same trust company was] represented by the Kelley, Drye firm of attorneys. On June 21, 1971 Manufacturers resigned as indenture trustee for the First and Refunding Mortgage of the New Haven. As recently as July 21, 1975, the Manufacturers sought leave of the United States District Court for the Eastern District of Pennsylvania to resign as indenture trustee for New York Central and Hudson River Railroad Company Gold Bond mortgage dated June 1, 1897, because of potential conflict with its former position as indenture trustee for the New Haven mortgage. So far as is known, Manufacturers continues to act as indenture trustee for the 17 remaining mortgages. The Commission,

therefore, will have before it for a finding, the factual issue of whether there has been and continues to be a conflict in interest on the part of the Manufacturers as former indenture trustee for the New Haven's First and Refunding Mortgage and as indenture trustee for the New York Central and/or Pennsylvania Railroad mortgages, and whether, if such conflict has existed, it has impeded or impedes in any way the New Haven reorganization."

The Manufacturers Hanover's petition to the Penn Central reorganization court to resign as indenture trustee for the New York Central and Hudson River Railroad Company Gold Bond Mortgage, dated June 1, 1897, was granted by the Penn Central reorganization court. It is undisputed that Manufacturers Hanover Trust Company is continuing to act as indenture trustee for each of the several bond issues of the New York Central and/or Pennsylvania Railroads which have interests contrary to those of the estate of the New Haven Railroad in reorganization. Moreover, the Manufacturers Hanover Trust Company, as indenture trustee of the New York Central and/or Pennsylvania Railroad bond issues, is of the opinion that it still has a duty to assert, on behalf of the bondholders of those issues, claims contrary to the interests of the New Haven estate, so long as it is in the interests of and the desire of the New York Central and/or Pennsylvania Railroad bondholders to do so.

The court finds that after the filing by the Penn Central of its petition for reorganization on June 21, 1970 and the filing of the judgment of the Supreme Court in the *Inclusion Cases* on June 29, 1970, the Manufacturers Hanover Trust Company, as indenture trustee for the New Haven Railroad's first mortgage bonds for nearly 25 years, 1941-1971, faced a conflict of interest with its position as indenture trustee for the New York Central and Hudson River Railroad Company Gold Bond Mortgage as well as it did with its position as indenture trustee for the 17 other New York Central and/or Pennsylvania Railroad bond issues. This was dramatized by the successful action which Manufacturers Hanover, as indenture trustee for the Gold Bonds, brought,

through the attorneys for its trust department, Kelley, Drye, Warren, Clark, Carr & Ellis, against the New Haven reorganization trustee on the ground that the New Haven reorganization court lacked jurisdiction, on remand of the *Inclusion Cases* by the Supreme Court, to pass upon the secured status of the New Haven's claim for payment for the New Haven's sale and transfer of its operating property.

The evidence shows that the Chairman of the Board of Manufacturers Hanover Trust Company was of the opinion that the Trust Company had become disqualified to continue to act as indenture trustee for all of the bond issues in question, *i.e.* both that of the New Haven and the 18 of the New York Central and/or Pennsylvania Railroads, and he so advised the appropriate officers of the Trust Company. The court is in entire agreement with that opinion. Although the Manufacturers Hanover, in apparent good faith, sought to resign from all of them and at the same time went to extraordinary lengths throughout the eastern United States to get qualified corporate banks to agree to act as successor indenture trustees, it was unable to do so. It did find a successor for the Gold Bond issue and on September 4, 1975 the Manufacturers Hanover's resignation, as indenture trustee for the Gold Bonds, was accepted by the Penn Central reorganization court and the successor indenture trustee was appointed. The New Haven reorganization court ran into the same problem when, by the most diligent and thorough searches and inquiries by the Manufacturers Hanover Trust Company, Simpson, Thacher & Bartlett, its counsel, and the New Haven reorganization trustee(s) and their counsel no bank could be found to act as successor trustee for the New Haven's first and refunding mortgage bonds. Although the underlying mortgage itself specified that a successor trustee must be a qualified bank, the court, on the basic principal that it cannot permit a valid trust to fail for lack of a trustee, appointed Lawrence W. Iannotti, Esquire, a qualified practicing lawyer in New Haven, Connecticut, as successor indenture trustee under the first and refunding mortgage 4% bond issue of the New Haven Railroad. Later in January, 1972, when the Chase Manhattan Bank, N.A., resigned,

because it was a creditor of the Penn Central, the court appointed Jacob D. Zeldes, Esquire, a qualified practising lawyer in Bridgeport, Connecticut, as successor indenture trustee under the New Haven Railroad's general mortgage (second series income bonds). This is not to suggest that a similar course should have been followed in the cases of the remaining 17 New York Central and/or Pennsylvania Railroad bond issues. For what it is worth, it is the opinion of this court that, considering the size and complexity of the Penn Central reorganization, such an arrangement would probably be entirely impractical. It is also understandable that those carrying on the reorganization proceedings of the Penn Central would probably not rise to their feet with unanimous outbursts of enthusiasm to see 17 new successor trustees with 17 new counsel enter the ballpark. Nevertheless the prospect of more problems superimposed upon already existing ones of immense difficulty cannot operate to condone a breach of fiduciary duty or justify it.

Simpson, Thacher & Bartlett, as Manufacturers Hanover's counsel, argue there was no breach of fiduciary duty by the Trust Company for these reasons:

Where a bank, such as the Manufacturers Hanover Trust Company, is trustee under two separate trusts and the cestuis of the two trusts are on opposite sides of a controversy involving the interests of the trusts, the bank can avoid responsibility for a breach of fiduciary duty if it arranges to have counsel for one department of the bank appear in the controversy in the name of the bank, on the side of one cestui (the New Haven), and also arranges to have counsel for another department of the bank appear in the controversy in the name of the bank on the side of the other cestui (the Penn Central). In its reply brief it said,

> "Admittedly, a potential conflict of interest existed, which Manufacturers had already recognized and sought to avert. The essence of the problem Manufacturers faced was that it ran the risk of breaching its fiduciary duty to one group of bondholders or the other if it failed fully to represent their interests during the time before it could resign."

It, therefore, weighed the relative risks of liability if it took or appeared to take one side or the other between the two cestuis; its first solution was to assign one of its lawyers to one side and another one of its lawyers to the other. The startling result was that, on opening court one morning, the New Haven reorganization court was handed a brief by the Simpson, Thacher firm from Manufacturers Hanover Trust Company for the New Haven side of the case, and it was then handed another brief by the Kelley, Drye firm from the Manufacturers Hanover Trust Company for the other side of the same case. This may have been (to adapt a remark by Prof. Freund) an exercise of the delicate art of threading that fine line "between partiality on the one hand and impartiality on the other." But it was not proper action by an indenture trustee. Manufacturers Hanover should have resigned from both, as its Chairman had said, but apparently no one felt the necessity of following through on his admonition. Even though the Manufacturers Hanover is a very large banking institution, it cannot be excused by saying that it was so large its right hand could not know what its left hand was doing nor could it be excused by doing through its attorneys and agents what it was forbidden to do as a corporate person. Its next solution was to resign from the indenture of the New Haven and much later, after being granted leave by the Penn Central reorganization court, it resigned as indenture trustee for the Gold Bond mortgage bonds. Meanwhile it has continued as indenture trustee for the remaining New York Central and/or Pennsylvania Railroad bond issues.

In its capacity as the indenture trustee for these 17 issues, it asserts that it is its duty to oppose the claim of the New Haven reorganization trustee. Manufacturers Hanover's counsel in its brief makes reference to the New Haven reorganization trustee's citation of *Woods* v. *City National Bank & Trust Company of Chicago*, *supra*, in support of the disqualification of Manufacturers Hanover Trust Company as indenture trustee for the New York Central and/or Pennsylvania Railroad bonds; but, as counsel for the Trust Company, Simpson Thacher asserts that there was no breach of fiduciary duty, and says:

> "The [New Haven reorganization trustee's discussion of the conflicts question is based on *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262 (1941). As the Trustee notes, 'the essential basis for the disallowance of these claims by the reorganization court was that the claimants were pursuing interests of their own that were either of no benefit to the estate or, more often, were adverse to it.' (Trustee's Statement, at 24). *Woods*, therefore, is inapposite since Manufacturers neither pursued any interest of its own nor pursued any interest adverse to the estate."

But it has "pursued [an] interest adverse to the New Haven estate" in pursuing the interests of the 18 New York Central and/or Pennsylvania Railroad indentures and it declares it has a duty to continue to do so. That is precisely what it has been doing over the past five years, and the *Woods* case declares it to be a breach of fiduciary duty. The law does not countenance such activity by a fiduciary — even an indenture trustee. *Woods v. City National Bank & Trust Company of Chicago*, *supra*; *In re Boston & Providence Corp.*, *supra*, 260 F. Supp. at 422.

Too much, of course, should not be read into or inferred from such phrases as "breach of fiduciary trust" or "disqualified . . . as indenture trustee". Such descriptive words do not say or imply that the Trust Company indulged in any conduct of a criminal nature or sought in any way to take or use other persons' property for its own use, or otherwise acquire any personal gain for itself. The Manufacturers Hanover Trust Company, through no action of its own, found itself in a position between conflicting interests, as to each of which it was in a position of indenture trustee. It could not help one without hurting the other.

The Trust Company, as indenture trustee for the New York Central and or Pennsylvania Railroad indentures did speak of resigning but was dissuaded from doing so. It never took a strong stand for that proposition and never, when contemplating its dilemma, refused to serve, following this stand by pressing for or seeking an authoritative court declaration of its rights and duties, as it should have done.

While it is clear that the breach of fiduciary duty by the Manufacturers Hanover to the New Haven's first mortgage bondholders has impeded, and therefore damaged, the New Haven reorganization trustee's collection of the sums owed the New Haven estate from the Penn Central for the transferred properties of the New Haven and has frustrated the further development of a plan of reorganization for the New Haven, the extent of such damage cannot be ascertained at the present time. Its measure turns on the amount of money which the New Haven estate will receive in payment of the Supreme Court's judgment on the price to be paid by the Penn Central for the New Haven property. If the principal amount of that purchase price is paid in full, the damage from the Manufacturers Hanover's breach of trust would be trivial and de minimis. If no money were received by the New Haven on the purchase price, the damage would greatly exceed the full amount of the Manufacturers Hanover claim for services and expenses. If the purchase price payment were ultimately to fall somewhere between nothing and the entire amount due under the terms of the judgment, the measure of the damage inflicted by the Manufacturers Hanover would go inversely up or down accordingly. The court finds that the Manufacturers Hanover Trust Company, as indenture trustee for the New Haven's First and Refunding Mortgage bonds, breached its fiduciary duty to the New Haven estate in reorganization and has damaged it. While *Woods* v. *City National Bank & Trust Company of Chicago*, *supra*, authorized a complete disallowance of fees for services and reimbursement of expenses, later cases in this Circuit and others have tempered this somewhat. See, *Berner* v. *Equitable Office Building Corp.*, 175 F.2d 218 (2 Cir. 1949); *Silbiger* v. *Prudence Bonds Corp.*, 180 F.2d 917 (2 Cir.), *cert. denied* 340 U.S. 813 (1950); *Chicago & West Towns Rys.* v. *Friedman*, 230 F.2d 364 (7 Cir.), *cert. denied* 351 U.S. 943 (1956).

This court will allow Manufacturers Hanover Trust Company's claim for reimbursement of expenses in full. There has been no objection to them, qua proper expenditures, they are found to have been reasonable and necessary and they may be paid out of the debtor's estate in the amount of $103,018.34 as hereinafter directed.

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In lieu of an absolute disallowance or reduction of the Trust Company's petition for *a fee* for services as indenture trustee for the New Haven's First and Refunding Mortgage, the court will deal with its petition as follows:

The Trust Company's claim for services rendered in the amount of $304,416.67, or any recoverable part of it, is ordered to be treated as contingent. The Manufacturers Hanover Trust Company is ordered to accept in full accord and satisfaction of the claimed sum and any and all claims for services, rendered by it as indenture trustee for the New Haven's First and Refunding Mortgage in any manner whatsoever, one-quarter (¼) of one per cent. (1/4%) of all payments made on and after the date of this judgment, to the New Haven estate in reorganization, for and on account of the purchase price, to be paid by the Penn Central for properties of the New Haven, as fixed by the judgment of the Supreme Court in the *Inclusion Cases*. Said payment of ¼ of 1% to the Manufacturers Hanover Trust Company shall in no event exceed $304,416.67 and no interest or other increments shall be added to this sum. In the event that the Manufacturers Hanover Trust Company declines so to accept whatever may accrue to it under the foregoing computation, the Trust Company's claim for services against the New Haven estate shall be disallowed in toto."

3(a). *Simpson, Thacher & Bartlett*, counsel for Manufacturers Hanover Trust Company, July 7, 1961 — August 30, 1971.

Simpson, Thacher & Bartlett's charges for attorneys' fees, July 7, 1961 — August 30, 1971, are presented as expenses of the Manufacturers Hanover Trust Company as indenture trustee for the New Haven's First and Refunding Mortgage.

At the outset the court should call attention to the remarks made by the trustee for the debtor, in his statement of position, relative to the Simpson, Thacher firm's services in this matter, involving its client's breach of trust. They are as follows:

> "If the Court considers Manufacturers' activities, in light of its conflict of interest, to warrant either disallowance or re-

duction of its fee, it is the Trustee's position that the Court should take into account that no question has ever been raised concerning the conduct of its counsel, Simpson, Thacher & Bartlett. Even though, as required under §77(c) (12), the petitioner is Manufacturers, rather than its counsel, and even though counsel can theoretically look to the client for payment, as a practical matter, a reduction in the amount allowed as reimbursement for legal fees is likely to impact persons who, in the Trustee's view, have benefited the Estate and as to whom no misconduct has even been intimated." (Footnote omitted.)

Although the court disagrees with the conclusions reached by counsel for the Manufacturers Hanover Trust Company in its brief that there were sufficient reasons given by the Trust Company to excuse it from a charge of breach of its fiduciary duty as indenture trustee for the New Haven's First and Refunding Mortgage bonds, it does agree with the statement by the New Haven reorganization trustee relating to the Simpson, Thacher firm. Such deductions as are made from the firm's statement of its services to the New Haven estate are for reasons which are in no way connected with any breach of fiduciary trust by the Manufacturers Hanover Trust Company.

The evidentiary material presented on behalf of the firm by Horace McAfee, Esquire, a senior partner, in his affidavit gave an excellent general narrative account of its participation in the reorganization proceedings of the New Haven Railroad from their inception on July 7, 1961 to August 30, 1971. With this account there was attached a thorough, detailed appendix which particularized everything done by the Simpson, Thacher firm as counsel to the indenture trustee for the New Haven's First and Refunding Mortgage bonds.

In general, the law firm of Simpson, Thacher & Bartlett, as counsel for the indenture trustee, attended and participated in every court hearing (other than a few which were simply routine), which concerned the reorganization of the New Haven Railroad. They also represented the indenture trustee in the hearings before

the three-judge court in the Southern District of New York and at the hearings held by the special master on the valuation of the Grand Central Terminal Properties.

From time to time they met and conferred with the reorganization trustees or trustee and their counsel on various problems in the reorganization, including financing (such as Trustees' Certificates), tax problems, leasing of cars and equipment, opposing harmful proposed amendments to New York State tax laws, sales of pieces of property subject to the mortgage of which Manufacturers Hanover Trust Company was indenture trustee, involving partial releases from the mortgage and the application or use of the proceeds, work on a plan of reorganization of the Boston and Providence Railroad, representation of the indenture trustee in aid of the New Haven estate in reorganization concerning certain abandonment proceedings and an effort to discontinue the costly New Haven Railroad passenger service, including a hearing before an I.C.C. hearing examiner.

With the reorganization trustees of the New Haven, and cooperation of the United States Trust Company, as indenture trustee for the Harem River Division Mortgage, Simpson, Thacher payed a very active and important role including judicial proceedings before this court, the United States Court of Appeals for the Second Circuit and petitions for certiorari to the Supreme Court, in barring the high priority claims of "six months" creditors of the New Haven, including per diem claims for a total of approximately $6,000,000.

After the reorganization trustees of the New Haven had negotiated a tentative contract with the officers of the Pennsylvania and New York Central Railroads, which were seeking to merge, pursuant to which the New Haven reorganization trustees were to turn over the transportation plant of the New Haven Railroad to the merged railroads for approximately $125,000,000, subject to the approval of the New Haven reorganization court, the Pennsylvania and New York Central Railroad negotiators requested and were given to understand that the New Haven reorganization trustees would not seek an increase in the amount

of the consideration to be paid by the merged Pennsylvania and New York Central Railroads. The New Haven reorganization trustees had thus established a beginning and a foundation for an inclusion price. The agreement never came before the reorganization court for approval and it was routinely sent along to the I.C.C. for initial study and action. All of the petitioners (or their predecessors, as the case may be) took the position that the consideration moving to the New Haven estate was wholly inadequate. As the New Haven reorganization trustees felt disqualified to seek changes in the tentative contract because of their understandings with the negotiators (a position which the court understood and expressly approved), the court left it entirely in the hands of the petitioners (or their predecessors), at the time, to oppose the contract and seek a larger payment or price for the property of the New Haven. This involved pressing for disapproval of the agreement by the I.C.C. which that body denied, hearings before the three-judge court in the Southern District of New York, a lengthy trial on review in the reorganization court, followed, after a grant of certiorari, by briefing and arguments before the Supreme Court. As counsel representing the indenture trustee for the New Haven's First and Refunding Mortgage bonds, Simpson, Thacher pulled the laboring oar in presenting the case before the Commission in the lower courts, and particularly in the Supreme Court. The senior partner of Simpson, Thacher & Bartlett prepared the brief and made the principal argument before the Supreme Court. He was ably seconded by the arguments of Attorney Migdal for the Bondholders Committee, and by Attorney Auerbach, special counsel to the reorganization trustee. Attorney Bushby of Dewey, Ballantine, Bushby, Palmer & Wood, prepared and filed an excellent brief.

The decision of the Supreme Court fixed the price to be paid for the New Haven properties at $174,000,000. The difference between this amount and approximately $125,000,000, *i.e.* $49,000,000, is roughly what the petitioners claim is the portion of the judgment attributable to their efforts except, they say, that there should be credited to them errors in the I.C.C. computation which three of them discovered. (1) The Dewey, Ballan-

time firm, counsel for Chase Manhattan Bank, N.A., spotted a double counting by the I.C.C. of $16.2 million paid in taxes; (2) the Simpson, Thacher firm, as counsel for Manufacturers Hanover Trust Company, discovered that cost of liquidation had not been discounted to present value, resulting in an understatement of $3,800,000; and (3) the Carter, Ledyard firm found there was an error in the New Haven estate's appraiser's valuation of the Bronx freight yards, resulting in an underappraisal of $4,600,000. Disclosure of these errors in the I.C.C. valuation determination added $24,600,000 to its computation and to the difference between the first I.C.C. valuation and the ultimate price fixed by the Supreme Court.

Another achievement to which Simpson, Thacher & Bartlett contributed was the holding by the Supreme Court that the shares of stock of the Penn Central, to be used in partial payment to the New Haven Railroad, particularly in the light of Penn Central's filing for reorganization under §77, was substantially overvalued for the purpose of "underwriting" the purchase price as ordered by this court and that part of the case was remanded "to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven estate as a shareholder or creditor of Penn Central." *New Haven Inclusion Cases, supra*, 399 U.S. 392 at 489.

The foregoing illustrative high points of the services rendered by the Simpson, Thacher firm, if studied in connection with the thorough review of the history of the New Haven reorganization proceedings, contained in the Supreme Court opinion in the *New Haven Inclusion Cases*, will reveal the complexity and, to a degree the novelty of the wide variety of issues with which the firm was required to deal.

The detailed account of the part it played and the contribution it made to the reorganization proceedings, are well set out in the affidavit of Horace J. McAfee, Esquire, and the attached appendix, as mentioned above. The court finds that the matters therein recited and the representations made are true and correct and that the fair and reasonable value of their services as counsel to

Manufacturers Hanover Trust Company as indenture trustee for the New Haven's First and Refunding Mortgage bonds is $808,000, plus such contingent addition as may later eventuate in accordance with a provision hereinafter recited.

4. Chase Manhattan Bank, N.A., as Trustee under the Debtor's General Income Mortgage, July 7, 1961 — March 31, 1972.

The evidentiary material shows that Chase Manhattan Bank, N.A., incurred and expended $84,648.83 in expenses connected with its services on behalf of the Debtor's estate. The court had previously indicated at a chambers conference held on March 8, 1966 that it would not authorize payment out of the Debtor's estate at that time for further studies to be made by Messrs. Wyer and Dick, but that this petitioner together with the First and Refunding Mortgage Trustee could later apply for reimbursement for these expenses. Inasmuch as neither the nature or amount of these expenses claimed by the Chase Manhattan Bank is contested, the court finds that all of the expenses were made, as alleged, and that they were reasonable and necessary, and they are approved and allowed under §77(c) (12), and are ordered reimbursed as hereinafter set forth.

The Chase Manhattan Bank contributed to the benefit of the Debtor's estate as a whole by its efforts to procure the services of Mr. Wyer for consultation work to be done by him with respect to a freight-only study which was being prepared by the New Haven Railroad staff and for a study regarding the savings which might eventuate in the event of inclusion of the New Haven's freight operations in Penn Central. It also contributed to the benefit of the debtor's estate by its cooperation and "watch-dog" services in connection with the day-to-day operation of the New Haven Railroad, for example the leasing arrangements by the reorganization trustees with the New York Port Authority, as set out generally in the affidavit of Mr. Schreiber and incorporated by reference in the affidavit of Charles F. Ruge, a Vice President of The Chase Manhattan Bank, N.A. The court finds

that these representations are true and it is the opinion of the court that the fair share of the claim to be paid as hereinafter set forth by the Debtor's estate of the request for compensation made by the Chase Manhattan is $44,400.

4(a) 1. *Dewey, Ballantine, Bushby, Palmer & Wood*, counsel for Chase Manhattan Bank, N.A., July 7, 1961 — March 31, 1972.

With regard to the attorneys' claim for services, the court accepts as true the representations and statements made in the affidavit of Joseph Schreiber which details the work performed. Since the beginning of these reorganization proceedings, there were before the court and the I.C.C. no issues of significant importance relating to the New Haven Railroad's reorganization and its efforts to preserve and enhance its assets in which counsel for Chase Manhattan Bank was not heard or did not participate. The Debtor's estate was benefited in particular by the observation of Mr. Schreiber that the I.C.C. had included $16.2 million dollars of accrued real estate taxes erroneously in liquidation expenses. It took appeals to the three-judge court and to the reorganization court, twice, before this error was finally corrected by the I.C.C. The Debtor's estate was also particularly benefited by the separate and distinct efforts of counsel for the Chase Manhattan Bank in connection with the claim on the value of that portion of New Haven's interest in the net income from the Grant Central hotel and office buildings; the inclusion of the New Haven in the Penn Central merger and the evaluation studies of the New Haven's assets carried out by Mr. Wyer; and the appeal to the Supreme Court relative to the *Inclusion Cases*.

After taking into consideration any alleged duplication of services by counsel for the respective petitioners and the benefit to the Debtor's estate, as a whole, it is the opinion of the court that the fair share to be paid as hereinafter set forth by the Debtor's estate of the claim by Dewey, Ballantine, Bushby, Palmer & Wood for compensation is $706,337, plus such contingent amount as may, at a future time, be payable as hereinafter provided.

5. LAWRENCE W. IANNOTTI, *Successor Trustee* under the Debtor's First and Refunding Mortgage.

Lawrence W. Iannotti, successor indenture trustee under the New Haven's First and Refunding Mortgage, has petitioned for compensation for his services as trustee and his out-of-pocket expenses and for the services and expenses of his counsel, Tyler, Cooper, Grace, Bowerman & Keefe, for the period from July 1, 1971 to June 28, 1974.

The court finds that the statements and representations recited in the petitioner's verified petition are true and correct with the exception of an error in mathematical computation of the fees of the petitioner's attorneys which requires a disallowance of $2,330.00. The statement of out-of-pocket expenses amounts to a total of $4,481.38. The expenses are found to have been reasonable and necessary and are ordered to be paid as hereinafter indicated.

The successor trustee fully and conscientiously performed all of the necessary watchdog services in protection of the bond issue and the New Haven estate. In addition he vigorously and skillfully participated in the litigation protecting the Debtor's estate and developed proposals for advancing payments on account of the purchase price for the New Haven properties.

After considering the successor trustee's performance of the watchdog services and his contributions in addition to them, and considering the great amount of time and energy he was required to expend to gain an historic knowledge of the New Haven reorganization prior to the date of his appointment on July 1, 1971, and a grasp of the problems current at that time, the court is satisfied that the compensation for his services, including those of his counsel, to the New Haven estate should be fixed at $68,100, as just and reasonable compensation, which is ordered to be paid in accordance with the schedule hereinafter set forth.

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6. JACOB D. ZELDES, *Successor Indenture Trustee* under the Debtor's General Income Mortgage.

Jacob D. Zeldes, successor indenture trustee for the General Income Mortgage Bonds, has petitioned for compensation for his services as successor indenture trustee and his out-of-pocket expenses as well as the expenses for the services of his counsel Zeldes, Needle and Cooper, P.C. These cover the period February 11, 1972 to June 15, 1975.

The court finds that the statements and representations recited in the petitioner's verified petition are true and correct and that his bill for out-of-pocket expenses in the amount of $1,165.91 is for items that were necessary and the charges are reasonable in amount. It is therefore ordered that they be paid from the Debtor's estate, as hereinafter indicated. The court further finds that the petitioner's services benefited the Debtor's estate and that the legal services rendered by his firm made a valuable contribution to the estate. The indenture trustee fully performed the required watch-dog services and in addition he exercised great skill in appearing at contested hearings before I.C.C. and the reorganization court on many occasions. His account of services rendered begins five days before his appointment as indenture trustee became official, because he had been offered and agreed to accept the appointment and immediately commenced the onerous task of gaining an understanding of the New Haven reorganization proceedings and the problems existing at the time. It is the opinion of the court that just and reasonable compensation to the successor indenture trustee for his services to June 15, 1975 is $33,971, to be paid as hereinafter provided by the Debtor's estate.

Contingent fee claims

Three of the law firms whose services have been discussed above, have claimed that they participated in these proceedings on a contingent fee basis, which presupposes that the action or proceeding has been carried through to the end, a result has been achieved in the form of a recovery of money, out of which a

percentage, previously agreed upon, is taken out and is paid to the attorney as his fee. In the present case there is no substantial cash recovery. The claims for having benefited the estate almost entirely concern matters leading up to and participating in the prosecution of the *New Haven Inclusion Cases* and the achieving of a judgment. When counsel say they achieved a great result, they are not contradicted, but it did not include a recovery of the purchase price for the New Haven properties. For the purpose of computing a contingent fee, it is only a money recovery that counts in the end. By this standard nobody knows at present how good the result really was. The present holding that the petitioners are entitled to recover certain fees, eliminates the risk of loss that they had carried but the fees are less than what a true contingent fee agreement would provide. What evidence there was of fee agreements implied that they were not entirely contingent. In case nothing had been recovered, it is fairly clear that the petitioners would have at least shared the loss. Nevertheless there was a kind of quasi contingent fee arrangement in which one chance factor was whether or not something would be granted by the court as allowances out of the Debtor's estate; and the other contingency was whether or not there might be a cash recovery under the Supreme Court judgment. Under the circumstances, however, allowances in the range of customary contingent fees could not be granted. The New Haven estate cannot justly be required to pay out, over the next few years, any more than the total expenses and non-contingent fees already awarded herein.

If, however, payments were to be made to the New Haven reorganization trustee for the property taken by the Penn Central, it is the court's opinion that the principal contingency would have occurred—a result stemming in substantial part from the contributions made by the petitioners to the New Haven reorganization proceedings.

It is, therefore, further ordered that in the event that there is a future recovery by the reorganization trustee of the New Haven Railroad of payments by the Penn Central or its successors or

assigns, on account of the purchase price fixed by the Supreme Court for the New Haven properties in the *New Haven Inclusion Cases*, the reorganization trustee or his successor or successors shall pay to:

(1) MANUFACTURERS HANOVER TRUST COMPANY for and on account of the services of its attorneys Simpson, Thacher and Bartlett,

¼ of 1% of such payment or payments;

(2) FIRST MORTGAGE 4½ BONDHOLDERS COMMITTEE for and on account of the services of its attorneys Migdal, Tenney, Glass & Pollak,

¼ of 1% of such payment or payments; and

(3) CHASE MANHATTAN BANK, N.A., for and on account of the services of its attorneys Dewey, Ballantine, Bushby, Palmer & Wood,

⅛ of 1% of such payment or payments.

Schedule of Payments:

The payments (other than contingent fee payments) ordered to be made from the Debtor's estate by the New Haven reorganization trustee to the petitioners for services contributed to the New Haven estate pursuant to the terms of this decision will be made to the following petitioners, in the amounts specified at the time indicated:

UNITED STATES TRUST COMPANY OF NEW YORK will be paid $5,625.00 on or before September 30, 1976 and $5,625.00 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been in full.

UNITED STATES TRUST COMPANY OF NEW YORK, on behalf of its counsel, Carter, Ledyard & Milburn, will be paid $56,250.00 on or before September 30, 1976 and $56,250.00 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE will be paid on behalf of its counsel Breed, Abbott & Morgan, $5,275.00 on or before September 30, 1976 and $5,275.00 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE will be paid on behalf of its counsel Migdal, Tenney, Glass & Pollak, $79,001.88 on or before September 30, 1976 and $79,001.88 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE will be paid on behalf of its counsel Harry P. Lander, $250.00 on or before September 30, 1976 and $250.00 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

MANUFACTURERS HANOVER TRUST COMPANY will be paid on behalf of its counsel Simpson, Thacher & Bartlett, on or before September 30, 1976, $101,000.00 and $101,000.00 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

CHASE MANHATTAN BANK, N.A. will be paid $5,550.00 on or before September 30, 1976 and $5,550.00 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

CHASE MANHATTAN BANK, N.A. will be paid on behalf of its counsel Dewey, Ballantine, Bushby, Palmer & Wood, $88,292.13 on or before September 30, 1976 and $88,292.13 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

LAWRENCE W. IANNOTTI, Successor Trustee, will be paid $8,512.50 on or before September 30, 1976 and $8,512.50 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

JACOB D. ZELDES, Successor Indenture Trustee, will be paid $4,246.38 on or before September 30, 1976 and $4,246.38 on each and every March 30th and September 30th thereafter to and including March 30, 1980, when said principal sum shall have been paid in full.

Reimbursement of expenses to the petitioners to whom they have been heretofore awarded shall be payable one-half (½) on or before January 6, 1977 and the remaining one-half (½) on or before July 6, 1977.

All payments for services and for reimbursement of expenses as herein awarded, whether contingent or not, shall be payable *without interest* and shall be *final* as of the last date of the services rendered as alleged in their respective petitions and not interim, except in the cases of petitioners Iannotti and Zeldes as to each of whom the payments are interim.[1]

The court retains jurisdiction over the orders specifying the dates and amounts of payments and all elements of the orders for contingent fee payments, all of which are subject to amendment or modification as justice and equity shall require.

Dated at New Haven, Connecticut, this 30th day of June, 1976.

ROBERT P. ANDERSON
United States Circuit Judge,
sitting by designation.

Footnotes:

[1] The three original trustees were Richard J. Smith, William J. Kirk, and Harry W. Dorigan. Shortly after the death of Trustee Dorigan, Trustee Kirk resigned on February 28, 1969 and Trustee Smith became sole trustee on March 1, 1969 and has continued as sole trustee since that time.

[2] The ABA Code of Professional Responsibility, DR-106B in pertinent part, mentions the factors to be considered as guides in determining the reasonableness of an attorney's fee:

> "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent."

[3] This forfeiture provision is not intended to become operative simply through the taking of an appeal from this judgment by the Manufacturers Hanover Trust Company.

[4] The New Haven Reorganization Trustee is empowered, in his discretion, to anticipate any of the payments ordered to be made under the within schedule of payments, that is, he may pay any one or more of them in advance of the date on which it is ordered to be paid under the schedule.

[Court's Amendment of September 30, 1976 to It's Opinion and Order of June 30, 1976]

Pursuant to Rule 60(a) of the F.R.Civ.P. the court, on its own initiative, hereby corrects a clerical mistake arising from the inadvertent omission from the draft of the Opinion and Order filed with the Clerk of the United States District Court on June 30, 1976 of the following two paragraphs:

The first is hereby inserted on page 38 (see page 10674) immediately after the heading, "3(a). Simpson, Thacher & Bartlett, counsel for Manufacturers Hanover Trust Company, July 7, 1961—August 30, 1971" and reading:

"The court finds that counsel's expenses in the amount of $15,234.81 were incurred in connection with the services of counsel, rendered for the benefit of the estate of the Debtor, that neither the nature nor the amount of these expenses is contested, and that they are reasonable and were necessary. They are, therefore, approved for payment under §77(c) (12) and are ordered reimbursed to counsel as hereinafter set forth."

The second is hereby inserted on page 45 (see page 10680), immediately after the heading, "4(a) Dewey, Ballantine, Bushby, Palmer & Wood, counsel for Chase Manhattan Bank, N.A., July 7, 1961—March 31, 1972" and reading:

"The evidence shows that counsel incurred and expended $19,605.47 in expenses connected with its services on behalf of the Debtor's estate, and that neither the nature nor the amount of these expenses is contested. The court finds that the expenses were made as alleged, that, except for the item described as 'extraordinary steno' expense in the amount of $10,595.65, which the court disallows to the extent of $10,000.00, the expenses were reasonable and necessary and are approved and allowed under §77(c) (12). Reimbursement is ordered in the amount of $9,605.74 as hereinafter set forth."

Amendment of this court's Opinion in Matter of New York, New Haven and Hartford Railroad Company, #30226 filed in this court June 30, 1976, as corrected in open court at New Haven on Sept. 30, 1976.

The clerk of the court is directed to send a copy of these corrections to the clerk of the U.S. Court of Appeals for the Second Circuit to be filed in that court as a supplement to the record of this case on appeal.

Dated at New Haven this 30th day of September 1976.

[Copies of these changes in the said Opinion should also be mailed to those parties who were entitled to copies of the June 30, 1976 Opinion.]

ROBERT P. ANDERSON
United States Circuit Judge,
sitting by designation.

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IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

JUDGMENT

This cause having come on for hearing on certain applications for compensation for services and expenses rendered and expended by the several applicants for the benefit of the Debtor's estate, and said applications having been duly noticed and all persons having been heard or given an opportunity to be heard;

And the Court having heretofore ordered and adjudged that the former jurisdiction of the Interstate Commerce Commission over fee applications under Section 77(c) (12) had been divested as of February 5, 1976, and vested in this Reorganization Court;

And this Court having filed, on June 30, 1976, an Opinion and Order On Applications Pursuant To Section 77(c) (12) of the Bankruptcy Act, For Compensation and For Reimbursement of Expenses Incurred on Behalf of the Bankrupt Estate;

And it now being duly advised in the premises, it is ORDERED, ADJUDGED and DECREED that the following petitioners be awarded the following amounts, including fees and expenses of their counsel:

(1) United States Trust Company, compensation for itself in the amount of $45,000.00 and expenses for itself in the amount of $275.36; compensation for its counsel, Carter, Ledyard & Milburn, in the amount of $450,000.00 and expenses for its counsel in the amount of $15,182.40;

(2) First Mortgage 4% Bondholders Committee, compensation for its counsel

(a) Breed, Abbott & Morgan in the amount of $42,200.00 and expenses for that counsel in the amount of $864.22;

(b) Migdal, Tenney, Glass & Pollack in the amount of $632,015.00 and expenses for that counsel in the amount of $43,560.88;

(c) Harry P. Lander in the amount of $2,000.00 and expenses for that counsel in the amount of $900.00;

(3) Manufacturers Hanover Trust Company, expenses for itself in the amount of $103,018.34 and compensation for its counsel, Simpson, Thacher & Bartlett, in the amount of $808,000.00 and expenses for its counsel in the amount of $15,234.81;

(4) Chase Manhattan Bank, N.A., compensation for itself in the amount of $44,400.00 and expenses for itself in the amount of $84,648.83 and compensation for its counsel, Dewey, Ballantine, Bushby, Palmer & Wood in the amount of $706,337.00 and expenses for its counsel in the amount of $9,605.74;

(5) Lawrence W. Iannotti, Esquire, compensation for himself in the amount of $68,100.00 and expenses for himself in the amount of $4,481.38;

(6) Jacob D. Zeldes, Esquire, compensation for himself in the amount of $33,971.00 and expenses for himself in the amount of $1,165.91; and

It is FURTHER ORDERED that the foregoing expenses shall be paid one-half on or before January 6, 1977 and the remaining one-half on or before July 6, 1977; and

It is FURTHER ORDERED that matters of compensation shall be paid in eight (8) equal installments; the first installment to be paid on or before September 30, 1976 and a like amount on each and every March 30 and September 30 thereafter to and including March 30, 1980, when said principal sum shall have been paid in full; and

It is FURTHER ORDERED that in the event that there is a future recovery by the reorganization trustee of the New Haven Railroad of payments by the Penn Central or its successors or assigns, on account of the purchase price fixed by the Supreme Court for the New Haven properties in the *New Haven Inclusion Cases*, the reorganization trustee or his successor or successors shall pay to:

(1) Manufacturers Hanover Trust Company ¾ of 1% of all payments made on and after the date of this judgment, to the New Haven Estate in reorganization, for and on account of the purchase price, to be paid by the Penn Central for properties of the New Haven, as fixed by the judgment of the Supreme Court in the *Inclusion Cases*. Such total payment or payments shall equal but in no event exceed $304,416.67, and no interest or other increments shall be added to this sum, which said Trust Company shall receive in full accord and satisfaction of its claim for its own services, rendered the New Haven Estate, provided in the event the Manufacturers Hanover Trust Company declines so to accept whatever may accrue to it under the foregoing computation the Trust Company's claim for services against the New Haven Estate shall be disallowed in toto; and to Manufacturers Hanover Trust Company for and on account of the services of its attorneys Simpson, Thacher and Bartlett, ¼ of 1% of such payment or payments;

(2) First Mortgage 4% Bondholders Committee for and on account of the services of its attorneys Migdal, Tenney, Glass & Pollack, ⅛ of 1% of such payment or payments; and

(3) Chase Manhattan Bank, N.A., for and on account of the services of its attorneys Dewey, Ballantine, Bushby, Palmer & Wood, ⅛ of 1% of such payment or payments.

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All payments for services and for reimbursement of expenses as herein awarded, whether contingent or not, shall be payable *without interest* and shall be *final* as of the last date of the services rendered as alleged in their respective petitions and not interim, except in the cases of petitioners Iannotti and Zeldes as to each of whom the payments are interim.

The Court retains jurisdiction over dates and amounts of payments and all elements of the orders for contingent fee payments, all of which are subject to amendment or modification as justice and equity shall require.

Dated at New Haven, Connecticut, this 30th day of June, 1976.

ROBERT P. ANDERSON
United States Circuit Judge,
sitting by designation.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

- -x

In the Matter of	:	NOTICE OF APPEAL
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,	:	In Proceedings for the Reorganization of a Railroad
Debtor.	:	No. 30226

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S I R S :

PLEASE TAKE NOTICE that petitioner Manufacturers Hanover Trust Company hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the final order and judgment entered in this action on June 30, 1976, as relates to the application of Manufacturers Hanover Trust Company for compensation for services rendered.

Dated: New York, New York
July 28, 1976

Filed [illegible]

Yours, etc.,

SIMPSON THACHER & BARTLETT
Attorneys for Petitioner
Office and P. O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

TO: (SEE ATTACHED SERVICE LIST)

CERTIFICATE OF SERVICE

I hereby certify that on this, the 28th day of July, 1976, I served copies of the foregoing Notice of Appeal on counsel for all parties of record, as follows:

Colin Pease
Deputy Transportation Commissioner
Department of Transportation
Bureau of Rail & Motor Carrier Services
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c/o First Mortgage, Four
Percent Bondholders
Committee Attorney
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Secretary of the Treasury of
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Philadelphia, PA 19104

Albert X. Bader, Jr.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

PETITION FOR CLARIFICATION OF OPINION

Manufacturers Hanover Trust Company, the former Trustee of the First and Refunding Mortgage of the Debtor, hereby petitions the Reorganization Court, pursuant to the reservation of jurisdiction set forth in its opinion and judgment, for an order in the nature of an order contemplated by Rule 60(a) of the Federal Rules of Civil Procedure, clarifying that portion of the "OPINION AND ORDER ON APPLICATIONS, PURSUANT to §77(c)(12) OF THE BANKRUPTCY ACT, FOR COMPENSATION AND FOR REIMBURSEMENT OF EXPENSES INCURRED ON BEHALF OF THE BANKRUPT ESTATE" (the "Opinion") entered herein June 30, 1976 which relates to the application of Manufacturers Hanover for compensation for services rendered.

Upon reviewing the Opinion with its counsel certain questions have arisen as to the meaning and effect of that part of the

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Opinion which relates to the compensation claim of Manufacturers Hanover. The questions arise from the statements that there was a breach of fiduciary duty by Manufacturers Hanover to the New Haven Bondholders and as to the consequences resulting therefrom.

Insofar as it relates to Manufacturers Hanover, the principal thrust of the Court's determination is that Manufacturers Hanover breached its fiduciary duty. In making this motion for clarification, Manufacturers does not seek reconsideration of that determination, although it expressly affirms that it disagrees, on both the law and the facts, with so much of the Opinion as found that Manufacturers Hanover's conduct constituted a breach of any fiduciary duty it owed, and expressly reserves its rights to appeal from so much of the Opinion (and Order) and from the Judgment entered thereon as is predicated upon such determination.

The points made on page 35 of the Opinion are significant, particularly the findings (1) that Manufacturers Hanover "through no action of its own, found itself in a position between conflicting interests, as to each of which it was in a position of indenture trustee. It could not help one without hurting the other", and (2) that Manufacturers Hanover did not seek "in any way to take or use other persons ['] property for its own use, or otherwise acquire any personal gain for itself."

Manufacturers Hanover believes that the scope and intended effect of the June 30, 1976 Opinion, and of the hearings from which it resulted were confined to the question of determining the compensation for services and reimbursement of expenses to be allowed to Manufacturers Hanover and certain other §77(c)(12) petitioners for services rendered to the New Haven estate. It also believes that the Court's findings and determinations, and specifically those dealing with its right to compensation, as reflected in the Opinion, and in the Order and Judgment based thereon, were similarly limited in their scope and effect.

We respectfully submit, however, that certain language in the Opinion of the Court, particularly at page 36 thereof, may be read or construed as having a far broader scope and effect than the nature of the proceeding, the scope of the hearings of the intention of this Court warrants. In order to forestall that implication and more clearly indicate the scope and effect of the Court's determination, we respectfully request this Court to enter an order clarifying its Opinion to prevent a construction having a broader scope and effect than the Court intended.

WHEREFORE petitioner prays:

(1) That this Court clarify its opinion by entering herein a supplement thereto to prevent a construction having a broader scope and effect than the Court intended; and

(2) Enter an order herein prescribing the manner of notice of hearing to be held on this petition and fixing a time and place for such hearing.

Dated: New York, New York July 28, 1976.

MANUFACTURERS HANOVER TRUST COMPANY
By FRANK W. KAESTNER
Senior Vice President

SIMPSON THACHER & BARTLETT
By ALBERT X. BADER, JR.
A member of the Firm
Attorneys for Manufacturers Hanover Trust Company, as Former Trustee of The First and Refunding Mortgage of the Debtor

VERIFICATION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FRANK W. KAESTNER, being duly sworn, deposes and says: I am a Senior Vice President of Manufacturers Hanover Trust Company, one of the Petitioners herein, and am in charge of its Corporate Trust Department; I have read the foregoing Petition and know the contents thereof and the same is true to my own knowledge except as to the matters therein stated to be upon information and belief, as as to those matters I believe it to be true.

FRANK W. KAESTNER

Subscribed and sworn to before me this 28th day of July, 1976.

FRANCES FRAUMENI
Notary Public

[NOTARIAL SEAL]

My Commission Expires March 30, 1977.

ORDER OF NOTICE

By petition dated July 28, 1976 Manufacturers Hanover Trust Company having asked this Court to clarify that portion of its "OPINION AND ORDER ON APPLICATIONS, PURSUANT TO §77(c)(12) OF THE BANKRUPTCY ACT, FOR COMPENSATION AND FOR REIMBURSEMENT OF EXPENSES INCURRED ON BEHALF OF THE BANKRUPT ESTATE" which relates to the application of Manufacturers Hanover for compensation for services rendered, NOTICE IS HEREBY given that this Court will consider clarifying said Opinion by entering a supplement thereto of the nature requested in said petition and that a hearing thereon will be held at the United States Court House in New London Connecticut at 11:00

A.M. on August 16, 1976. Any objections shall be filed with the Clerk of the Court on or before August 13, 1976. A copy of this Order, together with a copy of said petition of Manufacturers Hanover Trust Company, shall be mailed on or before August 5, 1976 to all parties who are customarily notified of hearings in these proceedings.

Dated: July 30, 1976.

ENTER:

ROBERT P. ANDERSON
United States Circuit Judge,
sitting by designation.

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DISTRICT COURT
NEW HAVEN, CONN.

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor	NOTICE OF CROSS-APPEAL In Proceedings for the Reorganization of a Railroad No. 30226

Notice is hereby given that Jacob D. Zeldes, Successor Indenture Trustee under the Debtor's General Income Mortgage dated as of July 1, 1947 hereby cross appeals to the United States Court of Appeals for the Second Circuit from that portion of the Opinion, Order and Judgment on Applications, pursuant to §77(c)(12) of the Bankruptcy Act, for Compensation and for Reimbursement of Expenses Incurred on Behalf of the Bankrupt Estate entered in these proceedings on the 30th day of June, 1976, which relates to the application of Manufacturers' Hanover Trust Company.

Dated at Bridgeport, Connecticut this 9th day of August, 1976.

Jacob D. Zeldes

Jacob D. Zeldes

Elaine S. Amendola

Elaine S. Amendola

BEST COPY AVAILABLE

Zeldes, Needle & Cooper, P.C.
333 State St., Post Office Box 1740
Bridgeport, Connecticut 06601

Attorneys for Jacob D. Zeldes, Successor Indenture Trustee Under the Debtor's General Income Mortgage dated as of July 1, 1947

A5 15

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were mailed, postage prepaid, via first class mail, to the following:

Colin Pease
Deputy Transportation Commissioner
Department of Transportation
Bureau of Rail & Motor Carrier
Services
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Wethersfield, CT 06109

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Secretary of the Treasury of
the United States
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Interstate Commerce Commission
Washington, DC 20423

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Honorable Louis J. Lefkowitz
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Albert E. West
Director of Business Regulation
169 Weybosset Street
State of Rhode Isalnd
Providence, RI 02903

Edwin E. Taylor, Esquire
General Attorney
Penn Central Transportation Company
6 Penn Center Plaza
Philadelphia, PA 19104

Dated at Bridgeport, Connecticut this 9th day of August, 1976.

Elaine S. Amendola

Elaine S. Amendola

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

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In the Matter of:

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Bankruptcy No. 30266

Debtor.

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United States Post Office
New London, Connecticut
August 16th, 1976

B e f o r e:

Hon. ROBERT P. ANDERSON, U.S.C.J.

THE COURT: I should think it might be easier, if you like, to make your arguments from the table seated, if you want to. We'll waive any custom, which has not yet developed very far in New London, whether you stand or not.

MR. SEYMOUR: May it please the Court, I'm here this morning to present motion of Manufacturers Hanover for clarification of your opinion of June 30, 1976. I'm advised by my partner, Al Bader, that I should first ask you to make a finding based upon the certificate which I'll hand your Honor that there was proper service of the notice of this hearing on all parties.

THE COURT: Very well.

MR. SEYMOUR: This is an application for very narrow clarification of your Honor's opinion.

I may say at the outset that I am sorry to have to ask for anything about your Honor's opinion, because you were so very generous in your observation about my firm, but I have an obligation here to a client that I can't overlook.

The proposed order --

THE COURT: Perhaps before you continue, Mr. Seymour, I will find that notice has been given, the pendency of this petition, in accordance with the order of notice.

MR. SEYMOUR: Very good.

The proposed order of clarification I would now like

to submit to your Honor. You'll see it is an application for a very narrow and limited clarification. Copies have been given to all counsel who requested them.

The order relates to a proposed -- requested clarification primarily of language in your Honor's opinion on page 36. While it is narrow and limited, it is regarded as of great importance by our client, Manufacturers Hanover, because in its present form, the opinion may lend itself to what we think is a misinterpretation that your Honor made a determination that the Manufacturers Hanover conflict of interest, which you found, resulted in unascertainable in amount, but very possibly substantial damage to the New Haven Estate, and as we read the balance of the opinion, it was not your Honor's intention to deal with that question. Your Honor never took testimony on damage, there was no evidence in the record on damage, and when you remitted the matter at one time to the ICC to make findings, you asked that it find whether or not there was any impeding of the reorganization by the alleged conflict of interest.

All those things seemed to us to indicate, as the balance of your opinion seems to indicate, that your opinion was addressed to the proposition that, in your view, because of the conflict, Manufacturers Hanover's compensation should be treated as contingent, which is the way your Honor finally disposed of the matter, and that the observations on page 36 and related

pages really related to the question of whether Manufacturers Hanover should be compensated in any other way and related strictly to the question of compensation and not to the question of any future investigation of the damage question, and since your Honor's opinion, in our view, and I hope in yours, was not intended to have the egregious results that concern the bank, and since there was no -- there's no support in the record for any such result, and your Honor never really tried to have the matter dealt with on the record, we would hope that because of your Honor's well-known sense of fairness, that you would make a modification in the opinion.

The -- there are several forms of modification. The one we proposed is a very modest one, but it could also be done by excision by some portion or all of page 36, and we merely submit to your Honor that some clarification is really necessary.

I want to make it clear to your Honor that we're not here asking for a reconsideration of your Honor's determination that there was, in fact, a conflict of interest. As your Honor knows, we've argued that there was not in all the circumstances, but we're not submitting that question to your Honor, we're not rearguing that question. It is a different question that we're submitting.

And for the reason that finding of conflict of interest, which we're not asking to have you determine, concerns

Manufacturers Hanover is quite aside from the natural sting of any finding of violation of fiduciary duty, the possibility at some future time, in some unknown way, somebody may claim collateral estoppel about it, is a subject of concern.

But, in any event, we're not asking your Honor to deal with that now.

I do think that I shouldn't overlook saying to your Honor that on the question of where the delay was caused which delayed the reorganization of the New Haven, as I see the record, it is really the action of the Court of Appeals in the two to one decision of holding they didn't have concomitant jurisdication is the source of delay, and as your Honor probably knows, theappeal from your Honor's decision -- and your Honor's decision certainly didn't delay anything, while it was instituted in the first instance by the Penn Central Trustees, and not by counsel for Manufacturers Hanover, which filed merely a seven-page "me too" brief, and that merely bears, I think, on the question of whether it wasn't the Court of Appeals' decision rather than anything else that caused the delay.

Now, let me add one other thing, and I am through.

We really, as I hope your Honor realizes, had no choice with the opinion standing in the shape it did at the time our time to appeal had to be dealt with, but to take an appeal, an appeal, a very narrow appeal questioning merely

this limited area was filed.

The question of whether the appeal ought to be pursued if your Honor should modify your opinion and deal with the clarification that we request, I'm not able to answer today. That is a matter which will have to be considered by the officers of the bank in the light of whatever ruling your Honor makes and by other counsel who are concerned with other indentures, as your Honor knows, but I will say this: that if the order is clarified, as far as I'm concerned, and some of my partners, we would certainly recommend that the bank consider not pursuing the appeal. But that's -- I just want your Honor to know that.

There's one thing that I think would help in the disposition of that whole problem. In the proposed clarifying opinion -- clarifying order, which we've submitted to your Honor, the fourth line from the bottom, there's a reference to Manufacturers Hanover having breached its fiduciary duty. If the word "technically" could be inserted before the word "breached", it would certainly help in any consideration of the matter by those who have to worry about what it says to the public and what it says to potential future litigants.

Now, I've seen the objections which have been filed by various people. They seem to me merely to leave it up to your Honor as to what to do, because they say, in effect, that

your Honor's opinion indicates what you had in mind, and you are the best fellow to deal with that point, and I don't see any objection which would stand in the way of clarification if your Honor decided to clarify.

And I hope your Honor will decide to clarify, as that would greatly aid in the whole consideration of the matter, and I really thin that your Honor would -- was -- was limiting your consideration to the impact on compensation, and you -- your Honor's decision created that impact, and we're not here to quarrel with that part of the disposition.

Now, let me just ask my colleagues if they have anything to add. I've been following some illegible notes, and that's the only kind of notes I can make these days. I find it a certain disadvantage in the passing years that I can't read my notes any too well.

Do you have anything else to add?

That's our position.

THE COURT: There's one matter that you did not touch upon, and I may be wrong in my assumption, but I understand it, the Manufacturers Hanover has given up any notion of resigning from the -- I think the seventeen remaining indentured trusteeships, which derived, I think, originally from New York Central bond issues?

MR. SEYMOUR: It hasn't resigned, and I don't know

whether it's given up any intention of resigning, but it hasn't resigned up to date.

I myself think that that does not create an additional conflict, but, in any event, I think I should say --

THE COURT: Well, the testimony, as you may recollect -- I don't have the transcript here from the vice president who testified -- was that the position was the same as the Kelly, Dry firm took on the original statement of position argument, and that they would continue to contest the validity of any equitable lien in favor of the New Haven.

MR. BADER: Your Honor, I think I made that statement, rather than Mr. Byrne. I believe that's an accurate expression of the -- full potential position of the bank, the question as far as I know -- the bank as trustee of those seventeen mortgages, I don't think that question has arisen since the appeal to the Second Circuit.

I should add one thing, your Honor, and I don't know that Mr. Seymour's aware of this. We have indications, but I can't say that there's any -- can't be said with any reliability that it is the intention of Judge Fullen, as he's done on occasion in the past, should a -- what he recognized as a conflict arising and he, as your Honor is apprised of this conflict, has been since July 7th of 1970 -- that that's the sort of thing that he would deal with, as he has in the past, by the

appointment of special fiduciaries, that's a method he has adopted where he's had conflict, your Honor.

I would submit that that really should be left there with him, and that your Honor has already adequately penalized Manufacturers Hanover for whatever conflict you found, and you shouldn't leave your opinion in a way which might impose some unknown, unpredictable and unexpected penalty beyond that.

THE COURT: Well, of course, it may be that the New Haven Trustee may be faced with an unknown, unexpected, further hostility from the bank on the ground that they feel it is their fiduciary duty to do so on behalf of the old bond issues of the New York Central and the bondholders, those bondholders.

MR. BADER: I suppose it will be open to make any contention at that time that is necessary, but I don't think your Honor's decision should become a subject of collateral estoppel in an area which your Honor never had litigated before you. That is to say, as to any damages.

THE COURT: Well, anyway, as I understand it, the present situation remains unchanged, in other words, the Manufacturers Hanover will attempt to continue as indentured trustee for those old New York Central issues?

MR. BADER: That's my understanding, subject to whatever ruling Judge Fullam makes in the event of a presentation of a conflict.

THE COURT: Very well. Anybody else have anything to say?

PROF. MOORE: Your Honor --

THE COURT: Yes?

PROF. MOORE: -- may I stand up? I seem to do better.

THE COURT: Yes.

PROF. MOORE: Or, at least, not as bad.

THE COURT: You are not quite as rangy as Mr. Seymour. Perhaps you feel more comfortable because you are closer to the table.

PROF. MOORE: The Trustee of the New Haven's position is that this Court correctly found that there was a conflict of interest, and I guess the opponents do not deny that. Certainly, it was well established that there was when two firms, Kelly, Dry, walked in for the Gold Bond mortgage and our good friends here walked in in support of the New Haven.

Now, certainly, a past conflict of interest -- and that cannot be denied, and in our point of view, there is a continuing conflict of interest.

The morality of a trustee is something that should be a little better than that of a barker at a carnival, and, yet, Manufacturers Hanover was the trustee in the New Haven reorganization for a good many years, and then when the conflict of interest arose, not only opposed New Haven, but walked out on

New Haven in the sense that it resigned that trusteeship and assumed or kept the seventeen or eighteen it now has.

We think that's wrong under trust law, and we think it's wrong on any standard of morality that's above that of the common marketplace.

Now, I appreciate somewhat this concept of collateral estoppel, but I don't see that there is any in this case that need concern at this time the bank. This Court had to find, and did find, there was a conflict of interest, and it was wrong, and that there was legal damage.

Now, all the legal damage that the Court then assessed was to make Manufacturers' compensation contingent.

Now, if there is some cloud placed over Manufacturers for large damages in the future, that's a cloud that it's created itself.

This Court now has not adjudged that Manufacturers is now liable in large sums of money; that question remains open, and there's nothing that I can see presently in the -- your opinion that could be used as collateral estoppel on damages.

It breached the trust, they did establish some damage to us. What other and -- damages, if any, would remain to be fought over in another day, and I think that's -- I think we should leave it just where your opinion puts it.

Thank you, sir.

MR. SEYMOUR: Could I just add a word to Professor Moore's observations?

Your Honor doesn't, in your opinion, leave it there. You do, in your opinion, foreshadow the fact that there may be large damages in the future. Whereas, in fact, your opinion was merely dealing with the question of the consequences of the conflict on the compensation, and your Honor ought to make it at least clear that that's all your opinion was dealing with, and that's what our proposed clarification does, and I -- while I'm the second greatest student of Professor Moore's observations -- I don't know who they are, but are certainly -- who would have greater understanding than I -- his assurance that collateral estoppel will never be claimed on your Honor's opinion is one which is not adequate to protect a commercial institute like the bank against a possibility that it may be claimed in -- possibly in Judge Fullem's court, and possibly here, and your Honor ought not to leave your opinion, I submit, in a way which creates a jeopardy which your Honor was not trying to create and was unrelated to the record before your Honor.

MR. MIGDAL: Your Honor, I would like to join in Professor's Moore's presentation, and only one word -- I don't see how Mr. Seymour conceives Judge Fullem will have before it the conflict question. In that court Manufacturers Hanover has the representative as the trustee for various bondholders, it

will single-mindedly pursue the interst of those bondholders. That bring it into conflict with the New Haven. But it presents no problem for Judge Fullem.

The problem is created in this court because it was in this court that Manufacturers came in first as the indentured trustee for the first mortgage bondholders, and at the same time took on duties in the Penn Central reorganization which created that conflict.

THE COURT: Anybody else? Mr. Zeldes?

MR. ZELDES: May it please the Court, on behalf of the General Income Mortgage, I, too, object to the proposed clarification.

I'm sorry at the outset that my position perhaps wasn't clear. Mr. Seymour mentioned that he interpreted the objections that had been filed as sort of leaving it up to the Court, and I should perhaps emphasize and clarify that we do object to any clarification, and that it is not merely as a matter of leaving it up to the Court, although we recognize, of course, that itis the Court's decision that will ultimately decide the issue.

I should perhaps emphasize the third point of our written objection, since it somewhat relates to the colloquy between you and Mr. Seymour, and that is that petitioner Manufacturers Hanover Trust Company, as found by the Court, has

continued as indentured trustee for the remaining New York Central and/or Pa. Railroad bond issues and asserts that it is its duty to oppose the claim of the New Haven reoganization trustee so as, in our view, to preclude it from entitlement to the relief. In other words, at this very moment, presumably, from the status of the record, the Manufacturers Trust through other counsel is taking positions that could very well damage the Estate of the New Haven Railroad, and from our point of view, as someone who has been characterized in the past as a junior lienholder, this could be of extreme important.

The next point I think that bears some comment is that your Honor's utilization of the discussion at page 36 that's challenged, and the reference to the word "damage", in our view, is not unrelated to the issue. To be sure, the issue was one of compensation, but some, including myself, had opposed any compensation to Manufacturers because of its breach of duty; and, your Honor, once you found the breach of duty, and once you adopted the course to you did defer on a contingent basis any compensation for Manufacturers, had to, in effect, discuss that there was not yet any measurable damage that could be calculated at this particular time.

It seems to me that the only way this could have been avoided, any discussion of potential damage -- the only way it could have been avoided would be to grant the relief

we sought, which your Honor did not do, and that is cut out all compensation for Manufacturers.

So it is our contention that although the precise issue is one of compensation, the discussion is not unrelated to the issue, and it is not merely idle dicta that has crept into the opinion.

There's one other general observation in response to Mr. Seymour's point concerning Judge Pullem that I just don't feel that he's in a position to take any type of action that can possibly correct -- protect, excuse me -- protect the General Income Mortgage of this Estate, and that this issue really must be one that your Honor must wrestle with.

The only other point may be a more narrow and procedural point. I'm not certainly exactly under what provision of the rules Manufacturers now seeks relief. Perhaps there ought to be some clarification of that, whether or not the Court, once an appeal has been filed, retains the type of jurisdiction that it must have to grant the relief that Manufacturers now seeks, whether it is under Rule 60(a) or Rule 60(b), or exactly what is the Court's power in this regard.

We didn't take a written position in regard to that in our objection because I don't believe there was anything in the moving papers indicating the jurisdictional base of the Manufacturers' claim for relief.

If your Honor please, just one other general observation about the proposed order, which I received last week. The last paragraph, where Manufacturers asks your Honor to find that this Court did not find and does not imply that the actions of Manufacturers Hanover resulted or should result in any liability, except insofar as its recovery of the compensation awarded it may be affected by the terms of this Court's judgment.

If your Honor please, it seems that in asking you to adopt that type of language, they're really seeking an advisory opinion for the future, and I join as vigorously as I can with Professor Moore that the issue that they fear is not yet ripe for consideation, it may or may not be down the road, that it doesn't seem that this type of advisory language should be entered to protect the institution which you have found has been in conflict of interest.

And for those reasons, if your Honor please, I respectfully request that you deny the relief requested by Manufacturers.

THE COURT: Very well.

MR. SCHLOSS: Good morning, your Honor. I'm speaking on behalf of Mr. Iannotti, who is Manufacturer Hanover Trust's successor indentured trustee. We filed an objection on Friday, which I hope arrived here by U.S. Mail, roughly along the

lines filed by the other parties.

With all due respect to Mr. Seymour and our predecessor, Manufacturers, we find that we also must oppose the proposed clarification for the grounds stated by other counsel this morning.

On the last point mentioned by Mr. Zeldes, it is my understanding that Manufacturers is proceeding under Rule 60(a), I believe, or is seeking an order roughly in the nature contemplated by 60(a), which speaks in terms of clerical mistakes, largely, and which indicates that jurisdiction over such petitions under Rule 60(a) cannot be made once an appeal has been docketed in the Court of Appeals.

So, for that reason, as well as the other reasons urged by other counsel, we would oppose the proposed clarification.

THE COURT: I'm not sure it's docketed, is it?

MR. SCHLOSS: I must say I'm not in possession of facts whether or not it has been docketed. We have received papers.

THE COURT: You filed a notice of appeal?

MR. SCHLOSS: Yes. Has it been docketed?

MR. BADER: I believe the ICC's appeal, your Honor, has been docketed. I don't actually know. I don't believe that the -- the appeal has been docketed.

The basis upon which we moved for the relief, your Honor, is the reservation in your decision at the foot of your opinion and order, the motion is in the nature of a motion under 60(a), but the authorities is not the rules. As you know, when we made the motion, the bankruptcy -- in bankruptcy, the Federal Rules of Civil Procedure applied only analogously. There have been a change in it. Professore Moore's more expert at this than I am, but there had been one set of rules at bankruptcy adopted which did not apply to Section 77 reorganization, which said, if I recall the language, that 60(a) itself was not applicable in bankruptcy, and which would accord with the prior practice that the use of the Federal Rules was analogous.

There has been now -- now became effective new rules in bankruptcy applicable to Section 77. They became applicable August 1, and I don'tknow what they say about Rule 60, your Honor.

MR. SEYMOUR: Well, in any event, we were trying to follow the reservation in your Honor's decision, and we thought that it was something that you clearly could deal with.

If there should be any question about it in your Honor's mind, however, and you indicated that you were prepared to make a change, we could make an application to the Court of Appeals, which 60(a) contemplates as a way of dealing with it.

But none of these objections were raised, they're last moment thoughts, and it seems to me it is so plainly within your Honor's jurisdiction, as all these objections rather suggest, that it should be dealt with that way, unless there's some overwhelming reason against it.

Mr. Zeldes point, I'd just like to comment on for a moment. His objection, as I understood it, in the course of the earlier proceedings about compensation, were that Manufacturers shouldn't be allowed anything because of the conflict.

Your Honor decided they should be penalized by having a contingent award, and that that adequately dealt with the conflict. I don't see how it is consistent to take the position now that damage was somehow lurking in this record when, in fact, there was never any evidence of it, and your Honor didn't suggest that you had found any damage, but merely left it hanging as a cloud, a cloud whose dimensions are terribly dangerous and terribly unfair, if your Honor didn't find, and there wasn't anything in the record -- as there wasn't -- to sustain damage.

Now, Mr. Zeldes seems to want to use that language or reserve the right to use it at some future time, and I submit the use of the opinion at some future time ought to be limited to your Honor's intention and not to any lurking threat which

was not within your opinion, and that's what we submit to your Honor.

I think that's all I really have to say about it.

THE COURT: Anybody else want to be heard?

PROF. MOORE: Your Honor, we don't object to this Court having jurisdiction. It is my understanding it could not grant any relief in derogation of an appeal that's been taken, and I wouldn't view a clarification of the opinion as necessarily in derogation of the appeal.

Our position is that you, this Court, has had in the past, and still has, and will continue to have jurisdiction over a matter of this kind.

THE COURT: All right. I take it that no one else has any argument to make? Ideas to offer of any sort?

I do have a few little corrections that I would like to take this occasion to make.

Now, I'm not sure whether you have the printed copy of the opinion.

MR. BADER: Some of us do, and some of us don't.

THE COURT: I'll make references in those -- very few corrections -- to both the typewritten copy, as it was filed by me, and also as it appears in the later printed copy.

Now, in the printed copy on page 10,660, for those of you who are favored with the printed copy, the first whole

paragraph, the seventh line right after the 2 in parentheses, the achievement of Carter, Ledyard and Milburn was somewhat depreciated by the increase in the valuation of the Bronx freight yards was "4,600.00". It was actually $4,600,000, the printed copy should be corrected in that respect. The typewritten copy, as filed, was correct to start with. We can, I think, just call that printer's error.

Now, on page 10,661 of the printed copy, and on page 21 of the typewritten copy, the last line of the first paragraph, at least in the printed copy, and I don't know where it is on the -- page 21 -- but it recites: ". . .the claim by Carter, Ledyard & Milburn for compensation for the services rendered in this case is $450,000." Then it goes on a new sentence: "It is a complete and final fee and it carries with it no contingency fee, interest or rights." As it reads, it says: ". . .no contingency fee interest". I don't know what that is, but, anyway, there should have been a comma there, and the opinion is corrected in that respect.

Now, on page 10,673 -- I was very sympathetic with Mr. Seymour when he was getting off some comments on the disadvantages of time and what not, and I learned, I figure, about 57 years ago, that the ablative follows the case, but somehow, whether it was printer's error or somebody else's on -- if your eye can pick up in the typed copy, I would say in the printed copy, it's

fourteenth line, I think, and in the sentence it says: "If the principal amount of that purchase price is paid in full, the damage from the Manufacturers Hanover's breach of trust would be trivial and de minimis." Not "de minimus".

Now, on page -- that was on page 36, perhaps I didn't say that. On page 36 of the typewritten copy, line seventeen. If that will help anybody. The de minimis correction.

Now, on the printed copy, page 10,671, we seem to be going backwards for some reason, but we put a period between Simpson and Thacher.

MR. SEYMOUR: That's premature.

THE COURT: It should be a comma.

MR. BADER: It should be nothing, sir.

THE COURT: What?

MR. BADER: It should be nothing.

MR. SEYMOUR: We cut out the comma after Thacher --

THE COURT: We'll make it nothing, scratch out the period. And on the typed copy, it's page 35, line nineteen.

Wait, I don't think that's right. No.

MR. BADER: Reference to Simpson Thacher at page 32.

THE COURT: Of the typed? Thank you.

However, on page 35, line nineteen, it said: ". . . sought in any way to take or use other persons' property for

its own use. . ." -- and there was -- well, they don't seem to -- yes. On the printed copy -- I'm sorry to have taken so long to find it, but it's page 10,672, and it's the fifth line, last word in the fifth line of the third paragraph there -- ". . .use other persons'. . ."

I might say aside that that area to which the application gave quite a lot of emphasis, in effect, that such descriptive words do not say or imply the trust company indulged in anything of a criminal nature, sought in any way to take or use other persons' property for its own use, was put in there to, well, prevent any of the parties -- though I think very few of the parties would have had that notion, but particularly the general public, from getting the impression that the Manufacturers Hanover Trust Company had indulged in some kind of criminal or quasi-criminal conduct or a civil wrong by way of conversion or misappropriation of funds, and that's what is meant by "use of other persons' property for its own use, or otherwise acquired for personal gain," and so forth.

Getting on with these corrections, which aren't as short as I thought, now on page 10,685 of the printed copy and page 52 of the typewritten copy -- I had a visit from Mr. Lander, I believe he had talked with some of the counsel here, he said he had, and I rather think to the reorganization trustee, I'm not certain of that, but he said that he was far

from well, that he was advanced in years, and that the program for payment might very well go beyond any possibility of his enjoyment of his award of fee and expenses, and asked if that could not be paid within the near future -- I mean, in its entirety.

Anybody want to be heard on that, or have anything to say on it? It's a small amount. Yes?

MR. SMITH: As trustee, he did speak to me about it.

THE COURT: He did?

MR. SMITH: Yes, and he did state, your Honor, that he was not well, and I thought he looked pretty well. I didn't get the significance that he thought he'd be dead in 1980. But, in any event, I told him that so far as the trustee was concerned, I had no objection to whatever arrangement he made with the Court, since there's no contingency in his amount of any kind, and the total amount is small.

THE COURT: I think it's two thousand for the fee.

MR. SMITH: But I said this whole question would depend upon the final situation as to appeals and challenges and so forth and so on, that if there was to be a general challenge as to the Court's order, the question was whether I should pay anybody anything. Subject to that, I have no objection to paying him.

As a matter of fact, you may recall, your Honor, that

in mentioning the tort payments, we paid some of them in full when it got to a certain point, and also where there was undue hardship by prolonging it.

THE COURT: Well, I don't think this qualifies as a tort, but, anyway, I think he said -- Mr. Migdal, he's -- emissary, messenger, Connecticut representative and what not?

MR. MIGDAL: I would very much hope that your Honor could see fit to order his payment at once. He has been very ill and I believe that, indeed, medication gives him an appearance of good health, and I would hope that that small amount could be paid promptly.

THE COURT: Well, anybody have any objection that it be taken care of as soon as the general situation of the case is clarified? Some jurisdiction is certainly in the Court to do it.

MR. SMITH: I think, however, that Professor Moore, under those circumstances -- or he should prepare some kind of an order for me to do that. It's now, the order will have to be changed.

THE COURT: I take it there's no objection to it being done sometime as soon as possible?

PROF. MOORE: Your Honor, the representative of the ICC is here, and it would be helpful to us if he would assure us that the ICC has no objection. Because the Commission

does have an appeal pending, you will recall, in which it challenges the jurisdiction of the Court to make any awards, and if it still adheres to that position, trivial as the amount is, I have some misgivings, but I would hope that the Commission might see its way clear of waiving this. It's a sum of only six or seven thousand dollars, or less.

THE COURT: Well, it's less than that, it's two thousand, compensation, I think -- I don't happen to have it. Does anybody know? I've cut it down, because he had charged for special stenographer, I think, or stenographic work.

MR. ZELDES: One O six eight five, your Honor.

THE COURT: Well, that is the -- doesn't give the whole amount. It simply gives the installment, I think, doesn't it?

MR. ZELDES: Oh, yes. It's with Mr. Migdal's.

MR. BADER: Twenty-nine hundred.

MR. MIGDAL: Your Honor, it's the sum of $900, and it can be seen on page 10,666 of the printed opinion. It's a total of $2,900.

THE COURT: $2,900.

Mr. Caplan?

MR. CAPLAN: Your Honor, I certainly have no personal objection to the proposal that was made. Your Honor has already denied our petition for stay of judgment, and the Commission has

made no decision as of the date, as to whether to seek a further stay from the Second Circuit Court of Appeals.

If your Honor requests some type of a formal response by the Commission, I can certainly forward the matter to the Commission for comments by the Commission. I would hope that that would not be necessary, though. I don't see any real need for that.

THE COURT: We'll hold it up until we get some official word on it. I appreciate your personal position, but it doesn't help on the record.

MR. CAPLAN: Does your Honor request some kind of comment from the Commission itself?

THE COURT: Well, I think if we can't get some assurance, authoritative assurance, we better let it wait until one is forthcoming.

MR. CAPLAN: I will make a presentation to the Commission when I get back and get back to your Honor on that, if it's all right.

THE COURT: Very well. Thank you. Appreciate it.

I think, unless, from these brief changes and remarks, someone has thought something else he'd like to say, everyone is here, I'll afford him the opportunity, but no one has anything, we'll adjourn court.

MR. SEYMOUR: I merely hope that your Honor will have

some further changes after you consider my --

THE COURT: We'll take it under advisement and see what comes out at 11:50.

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Order No. 813

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Debtor.

No. 30226

ORDER SUPPLEMENTING AND CLARIFYING THIS COURT'S OPINION OF JUNE 30, 1976

The Manufacturers Hanover Trust Company having filed a petition for clarification of this court's opinion, and certain respondents having filed answers and objections thereto, and all parties in interest having been duly notified of said petition and of the time and place assigned for hearing thereon, and having been heard or having been given an opportunity to be heard, this court now supplements and clarifies its opinion as follows:

The allegedly unclear portion of the court's June 30, 1976 opinion concerns the interpretation and application of two sentences on page 35 which are: "Too much, of course, should not be read into or inferred from such phrases as 'breach of fiduciary trust'

or 'disqualified . . . as indenture trustee'. Such descriptive words do not say or imply that the Trust Company indulged in any conduct of a criminal nature or sought in any way to take or use other persons' property for its own use, or otherwise acquire any personal gain for itself." It still seems obvious that the intent and purpose of these sentences were to forfend against the drawing of extreme and unjustified inferences by any of the parties in interest and by the general public against this petitioner by equating the phrase "breach of fiduciary trust" with criminal conduct such as embezzlement and larceny or with civil conversion or misappropriation of the trust res or a part of it. The above quoted two sentences were included in the opinion for the purpose above stated and no other. They are wholly irrelevant to any claim of failure on the part of the petitioner fully to carry out its equitable duties and obligations, or any consequences thereof, as Indenture Trustee for the New Haven bonds. The issue before the court at the time the decision of June 30, 1976 was rendered, concerned only the compensation of the petitioners and the reimbursement of their expenditures.

The petitioner plainly breached its fiduciary duty to the New Haven Railroad in reorganization and for five years has continued to do so. It has expressly stated its intention to adhere to this position in the future and to oppose and contest the claim of the New Haven estate in reorganization that the purchase price due for the New Haven's property, based upon the Supreme Court's judgment against the Penn Central in the *Inclusion Cases*, is secured by an equitable lien. For the past three years, at least, the petitioner has made no genuine effort to resign as Indenture Trustees for the remaining 17 bond issues for which it is still Indenture Trustee. In the light of all these circumstances this court was unable to make an outright, unconditional award of compensation for services rendered the New Haven estate by the petitioner and therefore made it contingent for obvious reasons.

This court in the proceedings on the petitions for compensation and the judgment of June 30, 1976, did not adjudicate any past or future claim for damages based upon a breach of fiduciary trust on the part of the Manufacturers Hanover Trust Company as indenture trustee for the First and Refunding Mortgage Bonds of the New Haven Railroad; and the finding of such a breach was made solely for the purpose of disclosing the reason underscoring the contingent nature of and the amount and time of payments of compensation, if any, which might become payable to the Trust Company. It was not intended to constitute a bar to any defense the Trust Company might interpose in an action for damages against it in any possible future litigation concerning its responsibilities as indenture trustee to the estate of the New Haven Railroad in reorganization.

The court retains and continues to retain jurisdiction over the issues in this case and affirms its judgment of June 30, 1976, discussed herein. It is so ordered.

Dated at New London, Connecticut, this 20th day of August, 1976.

ENTER:

ROBERT P. ANDERSON
United States Circuit Judge,
sitting by designation.

In The

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

IN PROCEEDINGS FOR THE REORGANIZATION
OF A RAILROAD

1578

FILED
AUG 31 11 '76
DISTRICT COURT
NEW HAVEN, CONN.

In the Matter of	)	
	)	
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,	)	NO. 30226
	)	
Debtor	)	

NOTICE OF CROSS-APPEAL

Notice is hereby given that Lawrence W. Iannotti, Successor Trustee under The New York, New Haven & Hartford Railroad Company's First and Refunding Mortgage dated as of July 1, 1947, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from that portion of the Opinion, Order and Judgment on Applications, pursuant to §77(c)(12) of the Bankruptcy Act, for Compensation and for Reimbursement of Expenses Incurred on Behalf of the Bankrupt Estate entered in these proceedings on the 30th day of June, 1976, which relates to the application of Manufacturers Hanover Trust Company.

Dated at New Haven, Connecticut this 23rd day of August, 1976.

LAWRENCE W. IANNOTTI, SUCCESSOR TRUSTEE UNDER THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY'S FIRST AND REFUNDING MORTGAGE DATED AS OF JULY 1, 1947

By _____
Irving S. Schloss, a Member of the Firm
Tyler, Cooper, Grant, Bowerman & Keefe
P.O. Box 1936
New Haven, Connecticut 06509

Attorneys for Lawrence W. Iannotti, Successor Trustee Under The New York, New Haven & Hartford Railroad Company's First and Refunding Mortgage dated as of July 1, 1947

A579

CERTIFICATE OF SERVICE

This is to certify that copies of the within notice were deposited in the U.S. Mails, first-class postage prepaid, to all parties who are customarily notified of hearings in these proceedings, on August 23, 1976.

Attorney

A580

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

In Proceedings for the Reorganization of a Railroad

In the Matter of THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor.	No. 30226

STATEMENT OF ASSETS, LIABILITIES AND CAPITAL DEFICIT AS OF THE CLOSE OF BUSINESS ON SEPTEMBER 30, 1976, AND SUMMARY STATEMENT OF OPERATIONS FOR SEPTEMBER 30, 1976.

Submitted herewith are statements of the assets, liabilities and capital deficit as of the close of business September 30, 1976, together with summary statement of operations for the month of September, 1976. Said statements were prepared in accordance with generally accepted accounting principles and are certified as correct by the chief accounting officer for the Trustee.

JAMES WM. MOORE
Counsel for Trustee

Dated: October 21, 1976

(10763)

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

STATEMENT OF OPERATIONS

	Month of September 1976	*9 Months Ended September 30, 1976*
INCOME		
Interest:		
Investment of Custodian funds	$ 85,517.26	$829,588.49
EXPENSES		
Compensations:		
Trustee	6,875.00	57,458.33
Counsel for Trustee	3,333.33	30,000.01
Trustee's employees	10,595.37	92,331.15
Payroll taxes	1,417.97	12,612.63
Attorneys', Accountants' and Consultants' Fees	62,545.00	415,438.05
Miscellaneous	4,964.25	48,201.95
Total Expenses	89,730.92	656,042.12
Income before fixed charges	(4,213.66)	173,546.37
Interest on Trustees' Certificates (Note 2)	27,343.75	246,093.75
Net Income	($ 31,557.41)	($ 72,547.38)

STATEMENT OF CAPITAL DEFICIT—SEPTEMBER 30, 1976

Balance—January 1, 1976	($50,284,762.28)
Net Income	(72,547.38)
Excess of City of Boston tax claims over settlement (Note 3)	2,030,859.10
Miscellaneous Items	222.50
Capital Deficit—September 30, 1976	($48,326,228.06)

October 21, 1976

Certified as Correct:
W. E. McLENNAN, Comptroller

A582

10765

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

BALANCE SHEET

ASSETS

September 30, 1976

Current assets:		
Cash		$ 104,011.54
Miscellaneous accounts receivable		1,598.84
Working funds		1,300.00
Other		14,676.41
		$ 121,586.79
Funds on deposit—U. S. Trust Company—Custodian Account:		
General account		
Investments (cost)	$18,233,100.71	
Accrued interest	134,346.65	
Cash	54,145.01	
Special account—funds released by mortgage trustees pursuant to Court Order No. 661		
Investments (cost)	781,576.21	
Accrued interest	8,358.52	
Cash	—	19,211,527.10
Consideration due for assets transferred to Penn Central Transportation Company on December 31, 1968 (Note 1)		121,959,605.02
Other items recollectible from Penn Central Transportation Company		209,922.45
		$141,502,641.36

See accompanying notes

A583

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

BALANCE SHEET

LIABILITIES AND CAPITAL DEFICIT

September 30, 1976

Current liabilities:		
Accrued fees—attorneys, consultants, etc.		$ 574,085.21
Accrued interest payable (Note 2)		246,093.75
Current portion of administration costs and expenses (Note 4)		986,543.65
Liquidated per diem claims		21,802.56
Other accounts payable and accrued liabilities		3,708.95
Liquidated tort claims		8,000.00
		$ 1,840,234.12
Long-term debt:		
Trustees' certificates (Note 2)		6,250,000.00
Debt in default:		
4% mortgage bonds due July 1, 2007	$76,819,900.00	
4½% income bonds due July 1, 2022	52,755,500.00	129,575,400.00
Reserves:		
Injury and damage reserves	762,278.92	
Reserve for administration costs and expenses (Note 4)	4,389,039.13	5,151,318.05
Other liabilities:		
Real estate taxes deferred by Court Order	13,415,039.11	
Interest in default—4% mortgage bonds	24,334,837.21	
Accrued contingent interest	7,121,992.50	
Administration costs and expenses—subject to semi-annual installment payments (Note 4)	1,767,764.33	
Other	372,284.10	47,011,917.25
Capital Deficit		(48,326,228.06)
		$141,502,641.36

October 21, 1976

Certified as Correct:
W. E. McLENNAN, Comptroller

See accompanying notes

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Notes to Financial Statements—September 30, 1976

The order in which the liabilities are shown in the balance sheet does not purport to state in any respect the priority of liabilities in the pending reorganization proceedings.

1. On June 21, 1970, Penn Central Transportation Company (hereinafter referred to as "Penn Central"), the principal subsidiary of Penn Central Company (a holding company created in 1969 which exchanged its shares on a share for share basis for all the outstanding shares of Penn Central), filed a petition for reorganization under Section 77 of the Bankruptcy Act. On June 29, 1970, in the *New Haven Inclusion Cases* the Supreme Court of the United States determined that the total consideration to be paid by Penn Central for the assets transferred to it on December 31, 1968, by the Trustees of the New Haven, plus $5 million for a share of New Haven's operating losses in 1968, aggregated $174,635,899. The Trustee of the New Haven has alleged in a proof of claim filed in the Penn Central reorganization proceedings that against this amount Penn Central is entitled to a credit of $41,939,841 consisting of $32,871,180 for assumption of certain obligations of the New Haven, cancellation of New Haven Trustees' Certificates then held by Penn Central and various cash payments, including $9,068,661.23 received on January 28, 1971 from the Penn Central Trustees, and that the principal amount remaining due by Penn Central was, as of the filing of such proof of claim, $132,696,058. Subsequently, the Trustee of the New Haven has received from the Penn Central Trustees cash payments in the amount of $10,736,452.75. The balance sheet shows the latter amount as well as the $9,068,661.23 received on January 28, 1971 as an offset against principal, but this, however, is done without prejudice to New Haven's claim that these amounts should be offset against accruing interest rather than against principal.

Pursuant to orders of the Interstate Commerce Commission, the Reorganization Court and a three-judge court in the Southern District of New York, the New Haven Trustees received $34,025,800 principal amount of Penn Central 5% Divisional First Mortgage Bonds due January 1, 1994, and 956,576 shares of common stock, prior to the decision of the Supreme Court. The Supreme Court stated in its decision of June 29, 1970 that it was requiring "a reassessment of the consideration that Penn Central is to give in exchange for" the New Haven's assets, stating that "further proceedings before the Commission and the appropriate federal courts will be necessary to determine the form that Penn Central's consideration to New Haven should properly take and the status of the New Haven Estate as a shareholder or creditor of Penn Central." The Supreme Court also affirmed the Reorganization Court in finding that the value of the assets conveyed to Penn Central fixed by the Commission was required to be increased by $29,035,899 which brings the over-all adjudicated value to $174,635,899, *supra*.

The Proof of Claim filed by the New Haven Trustee in the Penn Central Reorganization also alleged that:

(1) The consideration should be increased by interest on the balance of the consideration unpaid since December 31, 1968, until date of payment, less interest and dividends received by the New Haven from Penn Central (the Proof of Claim remaining undetermined, the foregoing statements do not reflect an accrual of such interest on the claim or any part thereof); and

(2) The claims of the New Haven Estate to the unpaid balance of consideration are secured by

(a) An equitable lien in all assets transferred by New Haven to Penn Central (except rolling stock);

(b) A constructive trust of the former right, title and interest of the New Haven in and to the Grand Central Terminal Property;

(c) The lien securing the 5% Divisional First Mortgage Bonds referred to above; and

(d) The 936,376 shares of Penn Central Company common stock referred to above.

In proceedings on remand of the *New Haven Inclusion Cases* from the Supreme Court, the Reorganization Court made findings concerning the account still owing by Penn Central to the New Haven Estate and the secured status of the Estate's claim which essentially agreed with the position on these matters taken by the New Haven Trustee as summarized above. However, on March 17, 1972, the Court of Appeals for the Second Circuit reversed the Reorganization Court on the ground that it lacked jurisdiction over the subject matter and remanded the matter to the Interstate Commerce Commission for further proceedings. The Court of Appeals stated that it did not intend by its decision to imply disagreement with the fairness of the decision of the Reorganization Court or with its conclusion that the Supreme Court's opinion in the *New Haven Inclusion Cases* requires that the New Haven Estate receive $1,435,500 as compensation for the taking of its property. The Supreme Court refused to review the decision of the Court of Appeals for the Second Circuit, the New Haven Trustee filed a petition with the Interstate Commerce Commission for further proceedings on the remand, and on August 29, 1973 the Commission granted the Trustee's petition for reopened hearings and provided that "to the extent hereinafter found to be necessary and expedient, such further proceedings shall be conducted in conjunction with, and consolidated for decision with" the pending Penn Central reorganization proceedings in Finance Docket No. 26241.

By operation of Section 618(b) of the Railroad Revitalization and Regulatory Reform Act all powers and duties of the Interstate Commerce Commission under Section 77 of the Bankruptcy Act, with regard to proceedings for reorganization of The New York, New Haven and Hartford Railroad Company, terminated as of February 5, 1976, and all such powers and duties then became vested in the Reorganization Court.

In July, 1971, the Penn Central Trustees petitioned the Penn Central Reorganization Court to adjudicate the above-described Proof of Claim filed by the New Haven Trustee. That Court declined, stating that "the ultimate disposition of the claims asserted by the New Haven Trustee is deferred pending completion of the program for handling proofs of claim in these proceedings and the receipt and consideration of objections in accordance with such program." Pending that adjudication the Penn Central Reorganization Court ordered that the New Haven Trustee shall be deemed to have "a lien, indeterminate in amount and indeterminate as to priority, upon all of the real property and readily identifiable tangible personal property (exclusive of rolling stock) conveyed to Penn Central" as of December 31, 1968, and which were still in possession of the Penn Central estate on June 11, 1971.

On December 31, 1974 the Trustee brought a summary action in the Penn Central Reorganization Court and a separate plenary suit in the United States District Court for the Eastern District of Pennsylvania, alleging fraud in the transaction that resulted in transfer of the New Haven's carrier assets and operations to Penn Central. The actions are based upon alleged violations, by

BEST COPY AVAILABLE

Penn Central, and certain of its officers and directors and affiliated companies, of the Securities Exchange Act of 1934, Rule 10b-5 thereunder and the Interstate Commerce Act. The relief sought is a judgment in substantially the same amount claimed by the Trustee in the above-described Proof of Claim, plus an amount equal to the expenses incurred by the Trustee in the Penn Central Reorganization and related proceedings, in order to protect the rights of the New Haven Estate, a lien on all former assets of the New Haven to secure such judgment, or alternatively, rescission of New Haven's conveyance of its assets to Penn Central.

2. The Trustees' Certificates consist of 5% notes and were due: $5,000,000 on August 1, 1971, and $7,500,000 on December 13, 1971. The U. S. Government now has the entire beneficial interest in the Trustees' Certificates as a consequence of its guarantee in connection with their issuance in 1961 and 1965, and the default in payment which followed the Penn Central bankruptcy. By Order No. 776, the Court approved an agreement between the Trustee and the United States pursuant to which the Estate paid the Government $1,023,188 in 1975 in full satisfaction of interest accrued through June 30, 1975 of $3,342,500, and cancellation, retroactive to that date, of $6,250,000 principal amount of the Trustees' Certificates. The agreement also provides that interest will accrue on the remaining Certificates only to the extent earned, as defined, and if earned will be paid annually, and principal payments may be required in subsequent years in the event certain financial conditions are met.

3. The Trustee and the City of Boston entered into a compromise agreement to settle the balance due on previously Court approved tax claims of $3,648,812.85 for a payment of $1,617,953.75, subject to Court approval. The agreement was approved by the Reorganization Court by Order No. 794 on April 14, 1976 and payment was made by the Trustee to the City of Boston on April 28, 1976. The excess ($2,030,859.10) of the claims over the settlement has been credited to capital deficit.

4. On June 30, 1976 judgment was entered by the Court awarding a total of $3,110,960.87 on prior applications presented by representatives and counsel for certain creditor groups for compensation for services found by the Court to be for the benefit of the Debtor's Estate and expenses incurred in connection therewith, payable in installments through March 30, 1980. A first payment of $376,632.80 was made on September 30, 1976 leaving a balance due of $2,734,307.98. The Interstate Commerce Commission, and Manufacturers Hanover Trust Company have appealed from the judgment and cross appeals have been taken by Bondholders Protective Committee, Lawrence W. Iannotti, Indenture Trustee, and Jacob D. Zeldes, Indenture Trustee.